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AMERICAN BAR ASSOCIATION JOURNAL

VOL. XXII NO. 11

Information as to Referendum on Child Labor Amendments and Legislation

Sixtieth Annual Meeting Makes Record of Constructive Accomplishment

We Examine the Record—of the American Lawyer

HON. FREDERICK H. STINCHFIELD

The Bar and the Public

HON. ARTHUR T. VANDERBILT

Senator Burke's Address at Association Dinner

Address of Hon. Hatton W. Sumners

Report of Special Committee on Supreme Court Proposal

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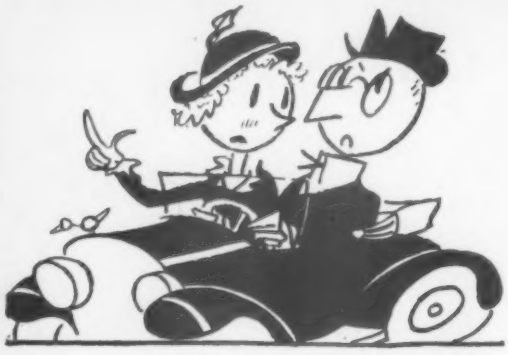

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AMERICAN BAR ASSOCIATION
JOVRNAL

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BY action of the House of Delegates pursuant to Article V, Section 10, of the Constitution of the Association, the members of the Association will vote by mail ballot during November upon five submitted questions, to determine the Association's attitude and action upon constitutional Amendments and pending legislation as to child labor. This article has been prepared, at the request of the President of the Association, for the purpose of making available to members of the Association more detailed information, as to the status and scope of the matters to be voted on, than could practically be sent to the membership with the official ballots.

The decision of the House of Delegates to exercise its constitutional powers to direct a referendum vote of the membership to decide the Association's future stand upon the child labor question was stated, by those supporting the motion for the referendum, to be based upon several considerations, among which were:

(1) That although the Association had for many years advocated legislation to end the abuses of child labor, and the members present at four successive annual meetings had voted opposition to the constitutional Amendment submitted to the States in 1924[1] and not ratified, relatively few members of the Association had ever voted upon this question of major policy.

(2) That the recent decisions of the Supreme Court of the United States in *Whitfield v. Ohio*[2] and *Kentucky Whip and Collar Company v. Illinois Central Railroad*,[3] the failure of the required three-fourths of the States to ratify the 1924 Amendment within nearly fourteen years, the unanimously favorable report of the Senate Committee on the Judiciary (by Senator Logan of Kentucky, for the Committee) upon the proposed Vandenberg alternative Amendment,[4] and the pendency and prospective passage of Federal and State legislation based upon the recent decisions of the Supreme Court, were deemed to constitute new and changed factors arising since the Association's stand as to the 1924 Amendment had been taken, and that in consequence the whole matter ought to be re-examined and the Association's attitude on the new and broader phases of the question, as well as upon the 1924 Amendment, determined by vote of the membership.

(3) That although for more than twenty-five years the Association has done what it could in furtherance of laws to end the commercial exploitation of children in industry, the Association's opposition to the 1924 Amendment has been bitterly and unfairly criticized as a defense and condonation of child labor, voted by relatively few of its members; that the persistence of this unjust and unfair misrepresentation is continually used to prejudice and impair the efforts of the Association upon other vital issues; and that in view of the new and changed aspects of the question, an opportunity ought to be given to the members to vote *an affirmative and remedial stand*, instead of merely an attitude of opposition to a particular Amendment.

(4) That although the members present at the annual meetings in such widely separated localities as Grand Rapids, Milwaukee, Los Angeles, and Boston, had voted to continue opposition to the 1924 Amendment and to continue a Special Committee for that purpose, the 1937 Assembly in Kansas City had voted to table the Committee's report and discharge the Committee; that the rising vote in the 1937 Assembly had not been closely counted but had been by a substantial margin; that more than half of the attendance at the Kansas City meeting came from a single State; and that the House of Delegates, as the representative body of the Association, could not in fairness to Association members in other part of the country, permit the unbroken attitude of previous annual meetings to be reversed and nullified, without enabling the whole membership of the Association to make the final decision.

(5) That the Constitution of the Association (Article V, Section 10) specifically empowers the

SUMMARY OF QUESTIONS TO BE VOTED ON BY MEMBERS

1. Should the Constitution be amended to give to the Congress powers as to the employment of children in industry?
2. Should the Amendment submitted to the States in 1924 be ratified?
3. As between the Amendment submitted in 1924 and the Vandenberg Amendment now before the Senate, of which would you prefer the ratification?
4. Should the proposed Vandenberg Amendment be submitted and ratified?
5. Should the Wheeler-Johnson bill (S2226) be enacted?

(*Full text of questions is shown on the ballot*)

1. For purposes of convenience in this Article, the Amendment submitted to the States in 1924 will generally be referred to as "the 1924 Amendment."
2. 297 U. S. 431; decided March 2, 1936.
3. 299 U. S. 334; 81 L. Ed. 183; decided January 4, 1937.
4. For convenience, this proposal will generally be referred to as "the Vandenburg Amendment."

House of Delegates to refer and submit to the vote of the members of the Association

"defined questions affecting the substance or the administration of the law or affecting the policy or recommendations of this Association, which in the opinion of the House of Delegates are of immediate, practical consequence to the legal profession and the public throughout the United States;"

and that under the existing circumstances, the question of the Association's stand upon proposals to amend the fundamental law of the United States comes clearly within the constitutional grant of power to the House of Delegates.

The resolution for a referendum was adopted by the House of Delegates, after long and earnest debate, by a vote of 112 to 15, a decisive majority of its total membership. The ballots are being sent to the members of the Association, for a vote by mail. No ballot received by the Board of Elections after December 1, 1937, can be counted. The results of the referendum will constitute the instructions of the Association's Special Committee as to Amendments and Legislation Relating to Child Labor.[5] It is earnestly hoped that every member of the Association will vote his views upon each of the five questions submitted.

SCOPE OF THE REFERENDUM QUESTIONS

THE *first* of the submitted questions calls for a vote as to whether the conditions produced by the labor of children should be dealt with by *a* constitutional Amendment, viz., as to whether the submission and ratification of *an* Amendment to the Constitution of the United States are deemed to be necessary or advisable, or whether the matter should be left to be dealt with through Federal and State legislation under existing constitutional powers as from time to time interpreted by the Supreme Court. Those who oppose amending the Constitution at all, on the subject of child labor, will vote "no" upon the *first* question.

The *second* question calls for an expression of views for or against ratification of the 1924 Amendment (text given below). It presents essentially the question whether the Association's previous opposition to the 1924 Amendment should be continued.

The *third* question calls for an expression of *preference* between the 1924 Amendment and the Vandenberg alternative Amendment (text given below), which has been reported unanimously by the Senate Committee on the Judiciary and is now before the Congress on the question of its submission to the States. The Judiciary Committee's favorable report (by Senator Logan of Kentucky) has been sent to the Association membership, as a part of the data accompanying the official ballot.

The *fourth* question calls for an expression of views for or against the submission and ratification of the Vandenberg Amendment (text given below).

The *fifth* question calls for an expression of views for or against the enactment of the Wheeler-Johnson bill (S. 2226), as to the products of child labor in interstate commerce. The bill is based on the recent decisions of the Supreme Court, and has passed the Senate. The text of the bill has been sent to Association members with the referendum ballots.

5. The name of the Special Committee was thus changed by the House of Delegates on September 30, 1937.

THE 1924 AMENDMENT

AFTER decisions of the Supreme Court were deemed to limit the powers of the National government to legislate to end the evils of child labor, agitation for an Amendment to the Constitution of the United States led to the submission of the following Amendment, by vote of the Congress on June 2, 1924 (Sixty-eighth Congress, 1st Session; H. J. Res. 184):

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States:

Resolved, by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which, when ratified by the legislatures of three-fourths of the several States, shall be valid to all intents and purposes as a part of the Constitution:

ARTICLE —.—

SECTION 1. The Congress shall have power to limit, regulate, and prohibit the labor of persons under 18 years of age.

SEC. 2. The power of the several States is unimpaired by this article except that the operation of State laws shall be suspended to the extent necessary to give effect to legislation enacted by the Congress.

Congressman F. H. Gillett of Massachusetts was then Speaker of the House of Representatives, and Senator Albert B. Cummins of Iowa was President *pro tempore* of the Senate. Calvin Coolidge was then President of the United States.

The action of the Congress attached no time limit within which ratification was required to be made, for validity, as has been done in the case of several other proposed Amendments.[6]

By the end of 1925, four States had ratified, and 35 had acted to reject, the 1924 Amendment. The thirteenth affirmative rejection (more than one-fourth of the States) took place in the Indiana legislature, on March 5, 1935.

At the expiration of seven years (1931), four States had ratified and 38 had rejected, but two of the 38 had undertaken ratification by subsequent legislatures. Ratification by States which had previously rejected continued. At the present time, nearly fourteen years after submission, twenty-eight States have ratified, many of them after previous affirmative rejections,[7] and twenty have rejected ratification. The year-by-year actions as to ratification are shown in an accompanying table, in which the cumulative totals are significant. This table has been adapted from that presented by Messrs. Lafon Allen and Oldham Clarke, of Kentucky, in their brief in *Wise v. Chandler, post*. It is claimed by advocates of the 1924 Amendment that if eight more States ratify, it will have been ratified by the required three-fourths of the States. Since the 1936 annual meeting of the Association, Kansas, Nevada, New Mexico, and Kentucky, have attempted ratification; but the action in at least Kentucky and Kansas is subject to litigation, the outcome of which will affect the validity of ratifications undertaken in various other States.

6. Validity of such a limitation upheld in *Dillon* v. *Gloss*, 256 U. S. 368.

7. For convenience in this Article, the term "affirmative rejection" is used to connote *definitive action* by the legislature of the State, adverse to ratification, as distinguished from failure or refusal to act.

THE VANDENBERG ALTERNATIVE AMENDMENT

BECAUSE the opposition to ratification of the 1924 Amendment has emphasized a claim that its language is needlessly broad and definitely objectionable, some of the advocates of a constitutional Amendment on the subject have favored the submission of an *alternative* Amendment which would obviate the principal objections to the *form* of the 1924 Amendment, and present squarely the question whether there should be a constitutional Amendment at all. In behalf of such a course, it has been urged that such an Amendment would be quickly ratified by the States, would make the constitutional change no broader than is needed to accomplish the purpose of ending abuses arising from the labor of children for hire, and would remove the dangers believed to be inherent in a ratification of the 1924 Amendment.

An Amendment proposed by Senator Vandenberg from this point of view was considered by the Senate Committee on the Judiciary, perfected in form and phrasing, and reported unanimously to the Senate, where it is now pending (Seventy-fifth Congress, 1st Session; S. J. Res. 144):

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States prohibiting child labor:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is hereby proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by conventions in three-fourths of the several States:

ARTICLE ——

SECTION 1. The Congress shall have power to limit and prohibit the employment for hire of persons under sixteen years of age.

SEC. 2. The power of the several States is unimpaired by this article except that the operation of State laws shall be suspended to the extent necessary to give effect to legislation enacted by the Congress.

SEC. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

The report by Senator Logan, of Kentucky, for a unanimous Committee, has been sent to all members of the Association.

The submission of the Vandenberg Amendment to the States *will not amend, supplant or withdraw the 1924 Amendment*. In that event, *both* proposals for an Amendment will be before the States. Any States may ratify either or both (assuming the 1924 Amendment is held to be still pending), and may ratify the Vandenberg Amendment even though it has ratified the 1924 Amendment.

COMPARISON OF THE 1924 AMENDMENT AND THE VANDENBERG SUBSTITUTE

POINTS of difference between the two proposals may be noted:

(1) The 1924 Amendment has been opposed as placing the age limit so high as to include men and women—"persons under 18 years of age." The Vandenberg Amendment limits child labor legislation to "persons under 16 years of age."

(2) The 1924 Amendment gives regulatory powers as to "the *labor* of persons under 18 years of age." This has been objected to as needlessly and dangerously broad, as possibly conferring powers over matters broader than the commercial exploitation of children as employees for hire in industry. The Vandenberg Amendment is related and limited directly to "the *employment for hire* of persons under 16 years of age."

(3) The 1924 Amendment has been opposed as needlessly conferring on the National government power to "limit, *regulate* and prohibit the *labor* of persons under 18 years of age." It has been urged that such *regulatory* powers might be too broadly construed and thereby permit invasion of other concerns of life. Powers to *"regulate"* have been given far broader implications than was deemed likely at the time the 1924 Amendment was proposed. The Vandenberg Amendment would confer only "power to *limit and prohibit the employment for hire,"* etc.

(4) The 1924 Amendment calls for ratification by State legislatures, without a prescribed time limit. The Vandenburg Amendment provides that ratification, to be valid, shall take place within seven years from submission to the States, and in its present form calls for ratification by *conventions* in three-fourths of the States. The convention method is advocated as likely to bring about an early and deliberate decision for or against ratification, through the convening of State bodies specially chosen by the people of the States for the purpose of expressing their will as to ratification.

(5) If the Vandenberg Amendment were now proposed and were accepted by three-fourths of the

RESOLUTION ADOPTED BY HOUSE OF DELEGATES SEPTEMBER 30, 1937

"Whereas, The American Bar Association has heretofore gone on record as opposed to the constitutional Amendment relating to child labor in form as presented in 1924 to the States for approval; and

"Whereas, The American Bar Association is not now and has never been opposed to an appropriate Amendment or appropriate legislation limiting or prohibiting the employment of children for hire;

NOW, THEREFORE, BE IT RESOLVED,

"1. That the House of Delegates approves and adopts the recommendations of the Special Committee as to the Child Labor Amendment.

"2. That the House of Delegates, pursuant to the powers vested in it by Article V, Section 10, of the Constitution, hereby authorizes and directs the Board of Governors to conduct a referendum to the membership of the Association upon the matters specified in the report of the Special Committee.

"3. That the Special Committee should be further continued as a Special Committee on Amendments and Legislation Relating to Child Labor."

States within the usual or average time for action upon a proposed Amendment, it would go into effect forthwith, whereas an attempted ratification of the 1924 Amendment would lead to protracted litigation as to the validity of such a ratification under the circumstances shown in the cumulative totals of the accompanying table.

In support of the 1924 Amendment, its adherents urge that the objections and fears arising from its phraseology have no substantial basis in fact, and that necessarily a grant of powers by constitutional Amendment is made in broader and more inclusive terms than would actually be exercised by the Congress, unless demonstrated need therefor arose. Advocates of the Vandenberg alternative point out that the broad language of the 1924 Amendment has frustrated ratification for more than fourteen years, leaving the Congress meanwhile powerless to enact the needed laws as to child labor, and that the advisable course now is to submit a sufficient Amendment which can be quickly ratified. Opponents of *both* proposals assert that, under recent decisions of the Supreme Court, the Congress has clear and sufficient powers to end the abuses of child labor by enacting a Federal law to supplement the State laws, and that there can be no need for amending the Constitution until and unless existing constitutional powers have been exercised and found inadequate.

ACTION OF THE ASSOCIATION AS TO THE 1924 AMENDMENT

BEFORE the 1925 annual meeting of the Association convened, more than one-fourth of the States had affirmatively rejected ratification of the Amendment submitted in 1924. This condition continued until about 1933 without substantial change, except that additional States rejected ratification and a few had ratified. The Association took no action on the Amendment until 1933, by which time a systematic effort was being made to secure ratification by States which had previously rejected ratification.

On recommendation of the Executive Committee, the 1933 meeting in Grand Rapids approved and adopted[8] a report containing an adverse resolution[9] as to the 1924 Amendment, as follows:

"RESOLVED, By the American Bar Association that the proposed Child Labor Amendment to the Constitution of the United States should be actively opposed as an unwarranted invasion by the Federal Government of a field in which the rights of the individual states and of the family are and should remain paramount. It should also be opposed on the ground that the Constitution should not be encumbered by prohibitory legislation. We maintain that notwithstanding difficulties encountered in the control of Child Labor products in interstate commerce, the cure for the admitted evil must be sought through state legislation, in connection with which the attention of the public should be drawn to the Uniform Child Labor Act approved by this Association in 1930."

Efforts to reconsider this action failed.[10] The address of the President of the Association[11] was on the subject "The Growing Impotency of the States," and was devoted considerably to an argument against the 1924 Amendment.

At the 1934 meeting in Milwaukee, the Executive Committee reported the creation of a Special Committee to oppose ratification of the 1924 Amendment.[12] The report was approved.[13] A preliminary report by this Special Committee, of which the late William D. Guthrie, of New York, was the Chairman, was published in the AMERICAN BAR ASSOCIATION JOURNAL for January, 1935 (pages 11 ff).

At the 1935 meeting in Los Angeles, the Special Committee made a further report of its activities in opposition to ratification.[14] This was received and filed without debate.[15]

At the 1936 annual meeting in Boston, the issue received extensive debate, on the floor of the Assembly, in connection with the reports of the Special Committee and the Resolutions Committee.[16] Efforts to reverse the Association's stand and to discharge the Special Committee were earnestly argued.[17] Resolutions to continue the Committee under instructions to oppose ratification of the 1924 Amendment and urge the adoption of remedial legislation, were adopted by a vote of 233 to 109.[18]

The 1937 Report of the Special Committee will be found at pages 293 to 298 of the Advance Program pamphlet sent to all members of the Association last August.

EFFORTS OF THE ASSOCIATION IN BEHALF OF STATE LAWS AS TO CHILD LABOR

ALONG with its instructions to oppose the ratification of the Amendment submitted to the States in 1924, the Association's Special Committee received a mandate to promote the adoption of a Uniform Child Labor Act by the States. Until the Kansas City meeting of the House of Delegates, the formal name of the Committee has been that of the "Special Committee to Oppose Ratification by States of the Federal Child Labor Amendment and Promote Adoption of a Uniform Child Labor Act." Although the Committee has from time to time made efforts to fulfill the affirmative part of its instructions, it has generally been known and regarded as the Association's Committee to oppose the ratification of the Child Labor Amendment submitted to the States in 1924.

During more than twenty-five years, the Association has sponsored and urged State legislation to lessen the abuses of child labor. The record does not support the charge that the Association has ever been indifferent to the evils inherent in the labor of children for hire, or that it has been content merely to oppose and obstruct ratification of the Amendment submitted in 1924. The National Conference of Commissioners on Uniform State Laws formulated a Uniform Child Labor Act, which was approved and recommended by the Conference in 1911 and by the Association[19] in 1912. The Conference continued its labors in this field, to perfect and strengthen its proposed uniform state law, in the light of the decisions of the United States Supreme Court. In 1929 and 1930, the Conference considered and completed its third draft of a recommended Act, which received the approval of the Conference and the Association in 1930.[20] All of this took

8. 1933 Annual Report Volume, page 46.
9. *Ibid*, page 319.
10. 1933 Annual Report Volume, pages 49-50.
11. *Ibid*, pages 235-237.
12. 1934 Annual Report Volume, page 366.
13. *Ibid*, page 56.
14. 1935 Annual Report Volume, page 597.
15. *Ibid*, page 211.
16. 1936 Annual Report Volume (No. 61), page 166 *et seq.*
17. *Ibid*, pages 168-188.
18. *Ibid*, page 188.
19. 1910 Annual Report Volume (Vol. 35), page 1154; 1912 Annual Report Volume (Vol. 37), page 26.
20. 1930 Annual Report Volume (Vol. 55), page 60.

ATTITUDE EXPRESSED BY THE ASSOCIATION'S SPECIAL COMMITTEE IN 1936

"The Constitution of the United States and the American form of government are a fundamental concern of American lawyers, along with all other good citizens. It is sincerely believed that this pending Amendment is needlessly broad and sweeping in its language and scope, and would place under the control of the federal government matters which it is in no way necessary to transfer to the federal power, even for the accomplishment of the avowed purpose of effective regulation or prohibition of labor by children in industry.

"The American Bar Association and your Committee have not been engaged in any defense or protection of work by children in industrial pursuits. The question is as to the manner in which the evils of child labor shall be dealt with by government, and whether the lives of the youth of America shall be placed under the control of the federal government, in the guise of limiting or prohibiting child labor. It is a serious and unnecessary thing to amend the Constitution in broad and sweeping terms, to take down historic limitations on the powers of the federal government.

"The American Bar Association has never declared against an Amendment properly drawn and limited to ending the abuses of child labor. No such Amendment is pending. Meanwhile, under the instructions of the Association, your Committee has earnestly urged the adoption, by the states, of a Uniform Child Labor Act, prepared under the auspices of this Association, to the end that the existing abuses through child labor shall be ended through the exercise of the appropriate powers of government. Furtherance of uniform state legislation along these lines is of prime public importance."

—Report of Special Committee to 1936 Annual Meeting, in Boston.

place years before the Association had undertaken any opposition to the Amendment submitted to the States in 1924.

Until 1936 and 1937, however, the battle-ground in the States centered chiefly around ratification of the 1924 Amendment. *Uniformity* in State legislation on this subject did not seem to have strong appeal to State legislatures; and the complete efficacy of such legislation, even though enacted, was doubted, as there then seemed to be no way of closing the channels of interstate commerce to the products of child labor coming from another State.

In 1935, the 1930 Uniform Act was reported as having been adopted by one jurisdiction, the District of Columbia,[21] for which it was enacted by the Congress. The earlier form of the Act (1911) was shown as having been acted on by Kentucky in 1914, by Massachusetts in 1913, by Mississippi in 1914, and with modifications by Utah in 1915.[21] However, every State in the Union had enacted laws prohibiting or limiting, according to its own conditions, the labor of children in industry. Through its Committee on State Legislation, one in each State, the Association had urged the adoption of State laws as to child labor, particularly the Uniform Act.

Activities in behalf of comprehensive legislation to end the abuses of child labor were renewed in 1936 and 1937, in view of the decision of the Supreme Court in *Whitfield* v. *Ohio*[22] and *Kentucky Whip and Collar Co.* v. *Illinois Central Railroad Company*.[23] For the first time, it appeared probable that, with the help of the Congress, each State could by its own laws protect itself to whatever extent it saw fit, not only as to the exploitation of its own children in industry, but also against the importation of products of child labor in other States. *Uniformity* in State laws was deemed to be no longer of the essence of the situation. As soon as the Congress should pass a statute closing the avenues of interstate commerce into a State to products manufactured by the labor of children under conditions prohibited by the State, it was urged that each State could enact such laws, under its own industrial and commercial conditions, as would effectually end both the exploitation of its children in industry and the invasion of its markets by the products of child labor elsewhere.

Missouri, New York, and Vermont promptly enacted protective statutes of this character, in advance of action by the Congress; and support was given to members of the Congress in their efforts to pass the supplementary legislation necessary to make the State laws effective.

PROGRESS TOWARD ELIMINATING ABUSES OF CHILD LABOR BY LEGISLATION

CONCERNING the recent developments as to legislation against the abuses of child labor, the 1937 report of the Association's Special Committee said:

"Under the instructions given by the Association, your Committee has continued its advocacy of the position that such abuses as exist by reason of lack of uniformity and effective enforcement of the State laws limiting the labor of children should first be dealt with through Federal and State legislation, to the full extent of the powers of the Congress and the State. In our report to the Boston meeting of the Association last August, your Committee brought to attention the prospect that Federal and State legislation could be made effective, in this field, if patterned along the lines of the Hawes-Cooper Act (45 Stat. 1084, Title II; 49 U. S. C. A., Sec. 60) and the Ashurst-Sumners Act (49 Stat. at L. 494, Ch. 412; 49 U. S. C. A., Secs. 61, 62), as to commerce in goods manufactured by the labor of convicts. In *Whitfield vs. Ohio*, 297 U. S. 431, decided on March 2, 1936, it had been held, in an opinion by Mr. Justice Sutherland, that a State may classify as an evil the sale of convict-made goods in competition with goods made by free labor and may forfeit such sales in the open market. It was also held that in

21. 1935 Annual Report Volume (Vol. 60), page 744.
22. 297 U. S. 431; decided March 2, 1936.
23. 299 U. S. 334; 81 L. Ed. 183; decided January 4, 1937.

view of the Hawes-Cooper Act, the power of a State to prevent the open-market competition of convict-made goods with the products of free labor extends to the sale of goods in the original packages, when shipped from other States; also that the rule that a consignee may sell, free from State interference, in the original package, is but incidental and is an impediment to State regulation which, in the case of convict-made goods, has been validly removed by the Hawes-Cooper Act.

"This decision seemed to point the way to greater effectiveness of Federal and State legislation in this field, in lieu of Amendment to the Constitution. The view of your Committee then expressed has been further fortified during the year. In *Kentucky Whip & Collar Company vs. Illinois Central Railway Company*, 81 L. Ed. 183, decided January 4, 1937, a unanimous Court, in an opinion by Chief Justice Hughes, upheld the validity of the Ashurst-Sumners Act, which makes it unlawful knowingly to transport in interstate or foreign commerce goods made by convict labor into any State where the goods are intended to be received, possessed, sold, or used in violation of its laws, and requiring packages containing convict-made goods to be plainly labeled so as to show the names and addresses of shipper and consignee, the nature of the contents, and the name and location of the institution where produced, and held that it is within the constitutional power of Congress to regulate interstate and foreign commerce. The Court also held that the Congress may prevent interstate transportation from being used to bring into a State articles, the traffic in which the State has constitutional authority to forbid, and has forbidden, in its internal commerce, even though such articles are useful and harmless and, as such, a legitimate subject of commercial intercourse.

"In accord with the view taken by your Committee in August of 1936, and with the hearty support of nearly all of the lawyers who have opposed ratification of the pending Amendment, Missouri, New York, and Vermont have already enacted laws dealing with the abuses of child labor, along the lines pointed out by the decisions of the Supreme Court. These will be effective as soon as the Congress enacts the necessary supplementary legislation to enable the States to prohibit or limit the sale of products of child labor originating in interstate commerce. Bills to effectuate this purpose are pending in the present Congress, but have not been enacted, due doubtless to the long absorption of time and energies on the Supreme Court issue. The early enactment of a suitable Federal law is highly desirable, as well as the passage of similar laws by such States as have not adequate laws on this subject. . . .

"In view of the great urgency and importance of effective action in these matters and because of the ready machinery now set up for the purpose, your Committee is of the opinion, and earnestly recommends, that its further instructions should come from the whole membership of the Association, and that a referendum to the Association membership should be authorized and forthwith conducted for that purpose. The further action taken by and in behalf of the Association ought to be that determined on and voted by the members of the Association. Whatever that action by the membership might be, it would add immensely to the weight and influence of the stand by the Association."

The New York statute (Laws of 1937, ch. 806), the enactment of which was urged by representatives of the American Bar Association and other Bar Associations, became a law with the signature of Governor Lehman, and will be effective in the State of New York as soon as the Congress enacts the Wheeler-Johnson bill or a similar measure. The New York law is as follows:

"SEC. 69-a. *Sale of goods produced with child labor.* No goods, wares, or merchandise, manufactured or produced in or for a factory or by industrial homework or produced or mined in a mine or quarry in this or any other state, or in any territory, dependency or possession of the United States, on or after the date this article takes effect, wholly or in part through the use of child labor shall be sold in this state to any person, firm, association or corporation, provided that the seller shall have notice that such goods, wares or merchandise were so manufactured, produced or mined.

"SEC. 69-b. *Definitions.* For the purpose of this article:

"1. The term 'child labor' shall be defined as employment of persons under sixteen years of age.

"2. The term 'factory' shall be defined as provided in the first sentence of paragraph nine of section two of the labor law. Goods, wares and merchandise shall be deemed to be manufactured or produced for a factory if labor, other than that incident to agriculture or farming, be done for a factory at any place upon its work or upon any of the materials entering into its product, whether under contract or arrangement with any person in charge of or connected with such factory directly or indirectly through one or more contractors or other third persons.

"3. The term 'industrial home work' shall be defined as provided in section three hundred fifty of the labor law.

"4. The term 'employment' shall be defined as permitting or suffering another to work.

"5. The term 'notice' shall be deemed to include, but not to be confined to, information derived from a label affixed to goods, wares or merchandise or to any package, container, crate or unit of rolling stock in which the same are contained.

"SEC. 69-c. *Violations.* A violation of the provisions of this article shall constitute a misdemeanor.

"SEC. 69-d. *Saving clause with respect to other laws.* Nothing in this article shall be deemed to modify, alter, repeal or amend any provision affecting terms, requirements, conditions, hours or wages of employment, or any definitions applicable thereto, contained in the labor law, the education law or any other law, general, special or local.

"SEC. 2. This act shall take effect on January first, nineteen hundred thirty-eight."

Supplementary legislation based upon the decision in the *Kentucky Whip* case last January has been drafted and introduced in the Congress, but failed of passage, under the conditions prevailing during the recent session. Plenary provisions as to the products in interstate commerce were introduced as the Wheeler-Johnson bill (S. 2226), which combined the provisions of bills sponsored by Senator Wheeler and Senator Johnson. They were incorporated into the wages-and-hours bill, and passed the Senate in that form. On the House side, the Committee on Labor took the child labor provisions out of the wages-and-hours bill, for separate consideration. The Wheeler-Johnson bill was then passed by the Senate as a separate measure, but it was not reached for passage in the House. At the coming session of the Congress those who seek to end the abuses of child labor are hopeful that this or some similar measure to make the State laws completely effective, by excluding from inter-

state commerce the products of forbidden labor by children, will become law.

Those who have urged that no constitutional change in the federal structure of government need to be made in order to end the exploitation of children in industry contend that there can now be no need or occasion for amending the Constitution to grant additional powers to the Congress. It is contended that the orderly, and probably sufficient, course is to use the powers of Congress and the States under present constitutional provisions, and to change the Constitution only if existing powers should prove inadequate. Those who still favor the ratification of an Amendment as to child labor point out that existing powers of the Congress do not enable it certainly to eradicate child labor in all of the States. They contend that if the State of X does not see fit to pass a law prohibiting or limiting child labor, the products of the labor of its children could still be sold within the State, in competition with products manufactured in States which have salutary laws as to child labor, and could be shipped for sale in any other State which had not passed laws forbidding the importation of such goods. It is said that the National interest forbids the continuance of commercial labor by little children, even within a single State. To these contentions, others reply that such matters are within the province of the particular State, and are best left there, unless the National government is to take charge of all local, intrastate concerns; also that, as a practical matter, no State has failed to pass laws to end the abuses of child labor, and that only the enactment of the supplementary legislation now pending is necessary to make the *legislative* prevention of child labor for hire completely effective, without changing the structure of government.

CONSTITUTIONAL QUESTIONS WHICH MAY ARISE AS TO 1924 AMENDMENT

SHOULD eight more States undertake to ratify the 1924 Amendment, several questions of constitutional law, as to the amendment process, will arise for adjudication; and a result in first instance will be litigation, rather than a definite empowering of the Congress to deal directly with the employment of children in industry. These questions include:

(1) Whether an Amendment to the Constitution, proposed by the Congress to the States, is still *"pending"* and is subject to later ratification by three-fourths of the States, *after* such proposed Amendment has been rejected by the affirmative action of more than one-fourth of the States (in fact much more than one-half of the States) and such rejections by the resolutions of both houses of the legislatures of those States and such resolutions have been duly certified to the Secretary of State of the United States (*U. S. Rev. Stats.* § 205, 5 *USCA*, § 160)—in other words, do such affirmative rejections by more than one-fourth of the States constitute a final decision of the referendum of the proposal to the State legislatures?

(2) Whether the power reserved to each State by Article V of the Constitution, to pass upon a proposal by the Congress to amend the Constitution, has been exercised and is exhausted, when once the legislature of the State takes affirmative action (rejecting or ratifying such proposal) and has duly certified such action to the Secretary of State; and whether, after a State has so affirmatively acted and has so certified its action, and after more than one-fourth of the States have affirmatively rejected ratification and so notified the Secretary of State, a subsequent legislature of such a State may validly ratify the proposed Amendment.

(3) Whether, in order to validate a proposed Amendment as a part of the Constitution, ratification by three-fourths of the States must take place within such a *reasonable time* after its proposal as would make their action an expression of the approval of the people, sufficiently contemporaneous in that number of States to reflect the deliberate popular will in all sections of the country at relatively the same period (*Dillon* v. *Gloss*, 256 U.S. 368; 65 L.Ed. 994); whether an Amendment proposed June 2, 1924, is validly "pending" at the present time (November, 1937), after the expiration of more than thirteen years without ratification; and whether, if the 1924 Amendment is still to be ratified validly, its re-submission to the States by the Congress is necessary.

(4) Whether the ratifications voted, in some of the States which changed their position, were validly voted according to the applicable State law.

IS THE 1924 AMENDMENT STILL PENDING?

The facts as to the affirmative rejection of ratification of the 1924 Amendment, by much more than half of the States, with due certification of such rejections to the Secretary of State in about half of the instances, are shown in the accompanying table. The remaining question is one of law, and opinion as to it is not expressed here.

As to whether more than a reasonable time has elapsed since the 1924 Amendment was proposed (more than thirteen years ago), and as to whether in consequence its ratification has lapsed or is still pending the Court of Appeals of the State of Kentucky, in its recent opinion in *Wise v. Chandler, post*, gave the following table as showing the length of time required for the adoption of the eleven Amendments subsequent to the Bill of Rights:

Eleventh	Amendment:	2 years,	4 months		
Twelfth	Amendment:		9 months		
Thirteenth	Amendment:		10 months		
Fourteenth	Amendment:	2 years,	1 month		
Fifteenth	Amendment:	1 year,	1 month		
Sixteenth	Amendment:	3 years,	6 months		
Seventeenth	Amendment:	1 year,	2 weeks		
Eighteenth	Amendment:	1 year,	1 month		
Nineteenth	Amendment:	1 year,	2 months		
Twentieth	Amendment:		11 months		
Twenty-first	Amendment:		9 months,	2	weeks
AVERAGE TIME:		1 year,	6 months		

It has been held that, in proposing an Amendment, the Congress has power to fix a reasonable time limit on ratification, and that *seven* years is a reasonable time.[24] No such limitation was prescribed in or as to the 1924 Amendment.

RECENT DECISIONS IN KANSAS AND KENTUCKY

ATTEMPTED ratifications of the 1924 Amendment, in States which had previously rejected ratification and certified rejection, have already given rise to litigation in Kansas and Kentucky, with generally opposite results, and a prospect that one or both of these cases will be carried to the Supreme Court of the United States. In that event, the final determina-

24. *Dillon* v. *Gloss*, 256 U. S. 368; 65 L. Ed. 994.

tions therein are likely to determine the validity of similar ratifications in other States.

In the Supreme Court of Kansas, in *Coleman* v. *Miller*, decided September 16, 1937, the majority of the Court held that the proposal of the 1924 Amendment retained its validity and pendency after and despite its rejection by a majority of the States; that the proposed Amendment was still pending although more than twelve years had elapsed since submission; that a State which had affirmatively rejected the 1924 Amendment could later reconsider and validly ratify; and that the vote for ratification in the Kansas legislature had no legal infirmities. Hutchinson, J., dissented from these rulings; Smith, J., voted a special and limited concurrence.

In the Court of Appeals in Kentucky, in *Wise* v. *Chandler*, also decided this fall, the Court reached conclusions generally opposite to those of the Supreme Court of Kansas. The Kentucky Court said, per Stites, J.:

"We think the conclusion is inescapable that a State can act but once, either by convention or through its legislature, upon a proposed amendment; and, whether its vote be in the affirmative or be negative, having acted, it has exhausted its power further to consider the question without a resubmission by Congress. If we should be in error in this conclusion—and, of course, our position on this question must bow to the views of the Supreme Court of the United States when they are expressed thereon—there are nevertheless the additional questions as to whether or not rejection by more than one-fourth of the States at one time did not terminate the 'offer' of the Amendment by Congress, and whether or not, under the decision of the Supreme Court in Dillon v. Gloss, *supra*, more than a reasonable time had elapsed between the submission of the Amendment and the alleged ratification by Kentucky. Accepting the analogy between the submission of an amendment by Congress and the making of an offer, under the principles of the law of contracts, the conclusion that the Amendment was no longer before the States at the time of the purported ratification by Kentucky in 1937 seems inevitable."

In support of its view, the Kentucky Court cited and quoted, *inter alia*, a letter published in the July 1934, issue of the AMERICAN BAR ASSOCIATION JOURNAL, by Mr. Frank W. Grinnell of Boston, Massachusetts, now a member of the House of Delegates of the American Bar Association. The Court further said:

"In addition to the fact that the Amendment before us was rejected by more than one-fourth of the States—indeed, it appears from the record that twenty-one of the States in 1926 had not only rejected the Amendment, but the resolutions thereon were duly certified to the Secretary of State of the United States, and thirty-seven States in all had actually rejected—there is the question, noted in Dillon v. Gloss, *supra*, from which we have quoted above at length, of whether or not more than a reasonable time has elapsed since the original submission of the Amendment. Assuming that the rejection of the Amendment by more than one-fourth of the States did not *ipso facto* terminate the proposal and require a resubmission by Congress if further action was to taken, it may at the very least be doubted if twelve and a half years is a reasonable time within which to act. . . .

"Since the decision in Dillon v. Gloss, *supra*, two proposals for amending the Constitution (since adopted as the Twentieth and Twenty-first Amendments) each contained a limitation of seven years. The power of Congress thus to fix a reasonable limitation upon the time within which an amendment should remain before the States having been sustained in Dillon v. Gloss, and Congress having attached a limitation of seven years to its submission of both the Twentieth and Twenty-first Amendments, it does not seem improper to conclude that this is the period considered by that body to represent a reasonable time for the States to act. Certainly, seven years is not too short a time, in view of the history of previous amendments as shown in the table above. Taking the instant Amendment itself, action had been taken in forty-two of the forty-eight States by the close of 1927. The fact that but one State (Colorado in 1931) acted between 1927 and 1933 indicates very strongly that general sentiment considered the proposition to be no longer before the people. It seems clear that the 'reasonable time' during which th 'offer' remained open necessarily expired at some time during the period of apparent abandonment between the end of 1927 and the revival of interest in 1933. Certainly, by any yardstick, more than a reasonable time had elapsed by January, 1937."

EACH MEMBER OF THE ASSOCIATION SHOULD VOTE TO DETERMINE AN AFFIRMATIVE AND REMEDIAL STAND

It need hardly be said that, upon issues so important to the whole country, every member of the American Bar Association ought to mark and return his ballot *promptly*, so as to vote his views upon each of the questions submitted. The House of Delegates has maturely decided that the Association should not longer rest under the reiterated imputation that its attitude relates only to the Amendment submitted in 1924 and has been determined by the votes of relatively few of its more than 30,000 members. Leaders of the Association have pointed out the opportunity, duty and responsibility of American lawyers to take an *affirmative and remedial, rather than merely negative, stand* upon this great constitutional problem in human welfare. The new and broader aspects of the issue are believed to present that opportunity.

Whatever may be the outcome of the voting and the resultant determination of the Association's attitude, it is to be hoped that a large vote will be polled, so as to elicit a full and representative expression of the opinion of members of the Association. This referendum affords another opportunity to demonstrate that American lawyers can and do act patriotically and affirmatively upon great issues affecting the Constitution and the welfare of the people who live under it and are protected by it.

NEW SERVICE TO MEMBERS

AS part of its program for increased service the American Bar Association has made arrangements to furnish to its members copies of Opinions of the Supreme Court, at a cost of $1.00 for each opinion. Copies of opinions will be sent by air mail within twenty-four hours after the opinion is handed down, which means that they should be received anywhere in the United States on the second day. Requests for opinions may be made prior to the time the decision is announced. All requests should be addressed to the American Bar Association, 1152 National Press Building, Washington, D. C., and should be accompanied by a check payable to the order of the Association for $1.00 for each opinion requested. If it is desired that the opinion be sent special delivery, 10c should be added to the remittance.

RECORD OF ACTION BY STATES, BY YEARS, ON CHILD LABOR AMENDMENT SUBMITTED JUNE 2, 1924 YEARS 1924 TO 1937, BOTH INCLUSIVE

NOTE: "Annual totals" show the number of States voting in each year. "Cumulative totals of first actions" include only first action of States to the end of each year, and do not give effect to subsequent attempted reversals of such first action.

"Cumulative totals of claimed ratifications" include ratifications (first actions and reversals of prior rejection) to the end of each year, and do not give effect to rejections in first instance.

X indicates ratification; O indicates rejection.

	1924		1925		1926		1927		1928		1929		1930		1931		1932		1933		1934		1935		1936		1937	
	Aye	No	Aye	No	Aye	No	Aye	No	Aye	No	Aye	No	Aye	No	Aye	No	Aye	No	Aye	No	Aye	No	Aye	No	Aye	No	Aye	No
Alabama																								O				
Arizona			X																									
Arkansas	X																											
California			X																									
Colorado				O											X													
Connecticut				O																				O				O
Delaware				O																				O				
Florida				O																O				O				
Georgia		O																						O				
Idaho				O																			X					
Illinois																			X									
Indiana				O*	(Thirteenth affirmative rejection, March 5, 1925)																		X							
Iowa				O															X									
Kansas				O																O		O		O			X	
Kentucky						O																O					X	
Louisiana		O																				O				O		
Maine				O															X									
Maryland								O												O				O				
Massachusetts				O																O		O		O		O		O
Michigan				O															X									
Minnesota				O															X									
Mississippi																						O				O		
Missouri				O																O				O				
Montana				O			X																					
Nebraska				O																				O				O
Nevada				O																				O			X	
New Hampshire				O															X									
New Jersey																			X									
New Mexico				O																		O		O			X	
New York																						O		O		O		O
North Carolina		O																						O				O
North Dakota				O															X									
Ohio				O															X									
Oklahoma				O															X									
Oregon				O															X									
Pennsylvania				O															X									
Rhode Island																						O		O		O		
South Carolina				O																		O		O				
South Dakota				O																O				O				O
Tennessee				O																				O				
Texas				O																O		O		O				O
Utah				O																O			X					
Vermont				O																				O				
Virginia						O																O						
Washington				O															X									
West Virginia				O															X									
Wisconsin			X																									
Wyoming				O																O			X					
ANNUAL TOTALS	1	3	3	32	0	2	1	1	0	0	0	0	0	0	1	0	0	0	14	9	0	11	4	20	0	5	4	7
Cumulative totals of first actions:	1	3	4	35	4	37	4	38	4	38	4	38	4	38	4	38	4	38	5	38	5	43	No	further	change	on	this	basis
Cumulative totals of claimed ratifications:	1	3	4	35	4	37	5	37	5	37	5	37	5	37	6	36	6	36	20	24	20	26	24	24	24	24	28	20

LEFT TO RIGHT
HON. SCOTT M. LOFTIN
HON. BRYCE B. SMITH, Mayor of K.C.
HON. LOUIS E. WYMAN Member Board of Gov.
HON. KENNETH TEASDALE Pres. Mo. Bar Ass'n

L. TO R. HON. CARL V. WEYGANDT
HON. JOSEPH B. ELY

L. TO R. HON. WILLIAM L. RANSOM, HON. SILAS H. STRAWN
COL. EDGAR B. TOLMAN, EDITOR-IN-CHIEF OF JOURNAL

HON. JAMES A. REED

NEW OFFICERS JUNIOR BAR CONFERENCE
L. TO R. PAUL F. HANNAH, Sec. WESTON VERNON JR. CHAIRMAN, HAROLD B. WAHL, Vice Chairman

SOME PERSONALITIES OF THE MEETING, AS CAUGHT BY THE KANSAS CITY STAR

WE EXAMINE THE RECORD—OF THE AMERICAN LAWYER

Examine What You May of Everything That Has Been Done to Make America Great, and There You Will Find Men of the Law as Leaders—The Struggle against Injustice in the Colonies Was Coincident with the Existence of Lawyers, with Their Leadership, Their Opposition to Tyranny, Their Teaching of the Rights of Free Men—When Hard Times Came after the Revolution, Their Good Deeds Were Forgotten, and Only Their Annoying Insistence on the Sanctity of Obligations Was Considered — But Whenever Danger Came Thereafter, When the Principles of Government Were at Stake, the People Always Returned to Their Faith in Lawyers—A Record of Devoted Leadership throughout a Century and a Half*

By Hon. Frederick H. Stinchfield
President of the American Bar Association, 1936-37

ONE hundred and seventy years have passed since the words echoed through the American Colonies; we have repeated them in faith and affection ever since; words of a patriotic American lawyer: "I have but one lamp by which my feet are guided, and that is the lamp of experience. I know no way of judging of the future but by the past."[1] Does anyone question the wisdom there expressed? We look at the record of the American lawyer. Let us judge him today by what he has done.

A somewhat kindred sentiment has been expressed by Mr. Justice Black of the Supreme Court of the United States:

> ". . . I do mean to say that, as a general rule, a man follows in the future the course that he has followed in the past. . . . Show me the kind of steps a man made in the sand five years ago and I will show you the kind of steps he is likely to make in the same sand five years hence. Show me the course he was pursuing then. . . . I will show you the course he is going to follow in the future. It is merely according to the law of nature; it is written in the human heart. . . ."[1a]

I state to you at once the conclusion of law: the judgment history has declared. What the record shows, evidenced with that brevity which the occasion requires, is the purpose of this talk with you. That conclusion, that judgment which history has rendered, is: that without lawyers, America was a Colony, not her own master; that with lawyers, and only because of them, America became free; that under their leadership, she has prospered and preserved freedom and opportunity in a far greater degree than the world has ever before seen, or, as the present seems today to indicate, will ever see again.

It would have seemed unnecessary but a short time ago, to tell America of the faith she has had in her lawyers; the record is written and any who assails the profession does well to argue *ex parte*, lest references to pages of the record overwhelm him. The proof of the faithfulness of the American lawyer could be detailed; but volumes would be required. Time is not available. Only an outline can be drawn. But even an outline will be vivid; so clear is the picture. What, for instance, is to be said of the one simple fact that for the one hundred and fifty years of selection of their Presidents, the people of the United States, three times out of four, have chosen a lawyer? But error is hardy, and, weedlike, springs up again and again wherever there is neglect in the cultivation of truth.

Excessively burdensome is the charge that the American lawyer is one who has sought his country's defeat.[2] It is hoped that the injustice of that declaration will soon be made clear. We could, with patience, await the return of a sense of fairness in the American mind, were not the charges against lawyers sealed with a signet that, with some, carries greater weight than the truths of our history. Patience is truly a virtue; but not the only virtue; there are some of us who do not choose to be among those described by Immanuel Kant: "When a man has made a worm of himself, he cannot complain if he is trampled underfoot."[3] Rudolph Von Jhering in his "Struggle for Law," approving Kant's declaration, declared, for himself, "Resistance to injustice, . . . is a duty of all who have legal rights, to themselves—for it is a commandment of moral self-preservation—a duty to the commonwealth;—for this resistance must . . . be universal." It would seem to be an indifferent matter, to free men, whether the injustice is found in high or low places.

Will our profession, under such stress, not be granted indulgence for a sin against convention and against modesty in reminding America of its good deeds? Aware that the proof is written in the skies, there can hardly be sincere complaint that all are asked to look upward and read.

To understand best, we must recall, first, the beginnings of America. We accept the description of our first citizen, given at Raleigh on August 18th, last, that

*Presidential address delivered at the Annual Meeting of the Association at Kansas City, on Monday, Sept. 27.

1. Words of Patrick Henry.

1a. Reported by the New York Times in its issue of September 17, 1937.

2. Address of President Roosevelt, March 4, 1937.

3. Immanuel Kant, in "Metaphysical Elements of Ethics," fourth edition, by Thomas Kingswell Abbott; quoted also by Rudolph Von Jhering in his preface to the fifth edition of "The Struggle for Law."

"it is a simple fact . . . that an overwhelming majority of those who came to the Colonies . . . belonged to . . . 'the lower middle classes.' "[4] We remember that these early colonists were without titles, money, property, learning or leaders; we know that the successful, the fortunate, the learned did not abandon the success, fortune and books of the Old World, to come West; we know that our early settlers of common origin came from countries where happiness was not for them, to wildernesses, discomfort and hard work. Their leaders were all to be developed here, to grow from our own soil. Their knowledge of history, their learning, were both to be gained in America. They left Europe, not merely to cultivate the soil, but to improve the mind and the soul, and to learn, when leisure permitted, the story of the past.

And so, when they came here thus, without learning or experience or leaders, and without a knowledge of history, these early citizens knew not how to prevent the growth of governmental injustice, or the curtailment of liberty, or the increase of unjust taxes. There was no one amongst them who could teach them the rights of free men. Or if they had known, there were no leaders who could insist upon their rights. Out of such conditions, lasting nearly one hundred years, unjust and tyrannical political situations were bound to grow; you know that they did grow; they are vividly revealed in our Declaration of Independence. You will recall the twenty-seven detailed grievances of that Document. They covered every phase of life. They named the weeds which had grown up in America when there were too few wise gardeners. These complaints were against a king, his parliament and their minions who had done too much as they pleased. You will have in mind the imposition of unjust taxes, the deprivation of trial by jury, the erection of a multitude of new offices, the suspension and even dissolution of legislatures, the quartering of armed troops on American citizens, the writs of assistance permitting government agents to enter anywhere and examine whatever they would, the appointment of absentee officials who ruled from London, of that kind of whom Junius wrote, "It is not that Virginia wanted a governor but a court favorite wanted a salary."[5]

Our people had come to a country without laws. Laws there must be; but there were none learned in the law or in government. Tyranny, to be sure, needed no teacher; it never does, even up to this day; it needed restraint, but there were none to offer it. You have noted that I have been speaking of the first one hundred or one hundred and fifty years of America. Why force and unjust laws could so readily thrive during those years, is clear. There were no lawyers. Grievances arose in the absence of lawyers; they were not remedied until lawyers came into being. Let us consider the record in that respect. Recall the governmental situation in the Colonies in these first one hundred and fifty years. Everywhere the legislative body was the sole court of law. A later development but passed the dispensation of alleged justice to the governor and his deputies. Everywhere courts were composed of laymen, with an occasional lawyer acting as a presiding officer.[6] Lawyers were hardly existent. As Charles Warren expressed it in his "History of the American Bar," "Even Massachusetts, like the other Colonies, started its career lawyerless." Even when, after many years, the people demanded that there be some separation of executive, legislative and judicial powers, the Crown's governor supported by his King insisted that judges be removable at his will. One of the first struggles arose when the colonists insisted that so much was essential, that their judges hold office during good behavior; that they be removed only for cause shown. But that battle was never completely won by the Colonies. Out of the failure came the complaint in the Declaration of Independence that the Crown "has made judges dependent on his will alone for the tenure of their offices. . . ." Professor Greene, in his story of "The Provincial Governor in the English colonies of North America," relates:

> "In the early days of the Colonies there was . . . very little scientific definition of powers; the administration of justice was then in some cases almost entirely in the hands of the governor and council."

Listen to a description of the early years of the Colonies before lawyers existed there to any appreciable extent. Mr. Warren says:

> "Nothing, however, in the early legal history of the Colonies is more striking than . . . the slight part which they (lawyers) played in the development of the country until nearly the middle of the Eighteenth Century. In every one of the Colonies, practically throughout the Seventeenth Century, a lawyer or attorney was a character of disrepute and of suspicion, of whose standing or power in the community the ruling class, whether it was the clergy as in New England, or the merchants as in New York, Maryland and Virginia, or the Quakers as in Pennsylvania, was extremely jealous."

In such fashion was it possible, in one hundred years, for the growth of injustice to become very rank. Who was there to stop the growth? It was not until after 1700 that there were lawyers, in any numbers or in any real sense. The need for them became so apparent that with the Eighteenth Century the profession of the law developed with great rapidity. The statement of the historian E. B. Greene is:[7]

> "At the beginning of the Eighteenth Century lawyers were so few that even the most important judicial positions were often filled by men without specific legal training."

And Mr. Warren's further comment:

> "In all the Colonies, the courts were composed of laymen, with the possible exception of the Chief Justice."

Do you need now to ask—How did the unschooled colonials finally discover the dangers and injustice of government? Why did they, after many years, determine that the powers of the legislative, executive and judicial departments must be entirely separate? The answer is clear: lawyers taught them. When the profession of law, after many years, developed, the grievances were made apparent. The struggle against injustice was coincident with the existence of lawyers in the Colonies, with their leadership, their opposition to tyranny, their teaching of the rights of free men. What does history record? Every man in America may not wish to listen; but the fairminded will hear and believe. Note the years mentioned.

4. Address of President Roosevelt, August 18, 1937, at Fort Raleigh, North Carolina.

5. "The Eve of the Revolution," by Carl Becker.

6. See "The Provincial Governor in the English Colonies of North America," by Evarts Boutell Greene; "Commonwealth History of Massachusetts," by Albert Bushnell Hart; "A History of the American Bar," by Charles Warren.

7. Vol. VI of Hart's "The American Nation" series.

Of Virginia, Mr. Warren says:

"Between the years 1750 and 1775, there was a marked growth in the size and ability of the Virginia Bar; and there arose a group of lawyers . . . whose political and legal talents placed Virginia in the forefront of the American Colonies."

With reference to Massachusetts:

"During the first forty years of the Eighteenth Century a small Bar of native lawyers of really great ability was slowly being established."

As to Pennsylvania, the remark is made:

"The real Bar of Pennsylvania may, probably, be said to have begun about 1740 . . ."

And further:

"The twenty years before the War of the Revolution in Pennsylvania were remarkable for producing a group of lawyers of broad legal education and distinguished ability."

There was the same development of lawyers throughout all the Colonies after the Eighteenth Century began; and there were few, before that, anywhere.

How troublesome this new profession at once became to the executive departments, can be quickly told. General Thomas Gage wrote, not long prior to 1775, to a correspondent in England in the state department, with reference to the opposition to the Stamp Act in Boston:

"The lawyers are the source from whence the clamors have flowed in every Province. In this Province nothing publick is transacted without them, and it is to be wished that even the Bench was free from blame."[8]

A Colonial lieutenant-governor of New York, Cadwallader Colden, wrote to England on January 22, 1765:

"If the profession of the law keep united as they are now, the abilities of an upright judge will not be sufficient to restrain the lawyers, without the security of an appeal to a court where they can have no undue influence. The lawyers influence every branch of our Government, a domination as destructive of Justice as the domination of Priests was of the Gospel; both of them founded on delusion."[9]

And again a month later:

"The dangerous influence which the Profession of the Law has obtained in this Province more than in any other part of his Majesty's Dominions is a principal cause of disputing appeals to the King, but as that influence likewise extends to every part of the administration, I humbly conceive that it is become a matter of State which may deserve your Lordship's particular attention."[10]

And in the same letter he further expresses himself:

"All Associations are dangerous to good government, more so in distant dominions; and associations of lawyers the most dangerous of any, next to military."

The author, referring to these letters, further remarks:

" . . . the individual lawyers of the day continued to be leaders in the struggle for the rights of the Colony which resulted in the Revolution."

John Adams ever insisted that American independence grew out of a speech of James Otis in his opposition to writs of assistance. That speech was made in 1761. John Adams says:

"American independence was then and there born; the seeds of patriots and heroes were then and there sown . . . Then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child independence was born."[11]

In spite of all the leadership of lawyers, the evils could not be cured without war. And so came the Declaration of Independence. Fifty-six names were signed to it. Twenty-five were the signatures of lawyers. And the words of that immortal Document were the words of lawyers. Out of that Declaration of Independence grew the Constitution of the United States. Fifty-five participated in the framing of that Magna Charta of American Liberty; thirty-two were lawyers As one of the lawyers James Madison is included. There is a much publicized, recent statement that Madison was not a lawyer;[12] but histories say he studied law. Some will ask, how are historians to be believed, as against omniscience? The answer lies in an incorrect assumption set forth in the question. Perhaps we could be kindly, and say that the statement was but intended to mean that Madison was a lawyer but technically; that merely the study of law and thereafter the practice of government, do not make a lawyer of any man. It may be agreed that lawyers themselves may doubt whether one who enters politics immediately after graduation from college and thereafter spends his life as a holder of public office in his state and at Washington, can be called a lawyer as the profession uses the word. But, as it was true in Madison's day, so it remains true today, that whoever answers the description just given has always assumed the right to tell the world what the Constitution of the United States means, whether he be a real lawyer or no lawyer. If the Constitution of the United States is a layman's document, as also recently declared, we may bow in respect to the twenty-three men of the Constitutional Convention who were not lawyers; to any twenty-three laymen who, in months of conference, could so completely silence and dominate thirty-two lawyers, and who were so learned that they could, in writing the Constitution, use words of law and of art so much better than the lawyers who were present. We prefer to accept the view of historians and the proof of the records that the Constitution was the work of lawyers.

Just before we declared ourselves free, there were two Continental Congresses called to consider the grievances against which lawyers were protesting so vigorously. Of the first assemblage, more than one-half were lawyers. In the second—such was the dependence of the people on them—more than two-thirds were lawyers.

With such a record made by lawyers in achieving for America so perfect a government, the criticism of lawyers even then showed how hardy a perennial it is; the weed seems incapable of destruction; from time to time, as the soil of economic prosperity thins after too rich a crop, it again and again springs into full bloom. So it was even in the days of the American Revolution; not strange perhaps that it appears again today. Liberty had been gained under the leadership of lawyers; the words of enduring freedom had been written by them. The country had chosen them as leaders; and the country, idealistically, was grateful. But spirits sink

8. "The Correspondence of General Thomas Gage with the Secretaries of State 1763-1775," by Clarence Edwin Carter.
9. "A History of the American Bar," by Charles Warren.
10. "A History of the American Bar," by Charles Warren.
11. A letter from John Adams to William Tudor, dated March 29, 1817, in "Old South Leaflets, No. 179."
12. Address of President Roosevelt in Washington, September 17, 1937.

when the battle is over; when each man is for himself, and only the day's work is involved and the work is laborious, leaders are forgotten. "Hard times" came to the Colonies and to the new United States. The war took its toll, economically. Men were in debt; the country's money was of little value; creditors sometimes were insistent. And lawyers were doing their professional duty by their clients. The good deeds of lawyers, in stress, were forgotten. Their annoying insistence on the sanctity of obligations, was all the people could see. From then on, whenever danger again came, and when the principles of government were at stake, even to this day, the people returned to their faith in lawyers. But whenever no dangers threatened, lawyers were but neighbors, and troublesome ones. It is even written that in the wide economic distress following the Revolution, much of the opposition to the adoption of the Constitution was based upon the fact that its work was done by lawyers. In 1787 John Quincy Adams, then at college, wrote:

> "At a time when the profession of the law is laboring under the heavy weight of popular indignation; when it is upbraided as the original cause of all the evils with which the Commonwealth is distressed; when the Legislatures have been publicly exhorted by a popular writer to abolish it entirely, and when the mere title of lawyer is sufficient to deprive a man of the public confidence, it should seem this profession would afford but a poor subject for panegyric; but its real ability is not to be determined by the short-lived frenzy of an inconsiderate multitude nor by the artful misrepresentations of an insidious writer."[13]

In other words, then, as now, the lawyer is the greatest of the earth when he is of one's own opinion; but the least when, opposing, he insists upon results which selfishness does not desire. One is reminded of the old statement:

> "No man e'er felt the halter draw
> With good opinion of the law."

The Revolution was won. America became free, her own master. We pass on from the lawyers who wrote that Constitution of which Mr. Gladstone said:

> ". . . the American Constitution is . . . the most wonderful work ever struck off at a given time by the brain and purpose of man."

Early America had prospered, but, as we have seen, tyranny had grown with no lawyers to guide. Lawyers came and tyranny disappeared. But materially a price was paid for the overthrow of injustice; there was depression. The good done by the profession was, for the moment, forgotten, when the minds of men turned from the contemplation of the ideals of liberty to the littleness of the work of each day. But what the American people remembered, in choosing, henceforth, their leaders, was what lawyers had done for America, not what they had done, each day, for every man's competitor. Shall we turn to the part of the record which speaks of events after we became a nation?

Before that recital, let us consider a moment. What has America become? What is this land we call the United States? The poor and afflicted from all the earth have come to our shores; they came in such numbers that the laws of ours and of other countries had to be invoked to lessen the influx. Would not the downtrodden of all the earth be congregated here had it been possible for them to do so? Nowhere in the world, in any age, has there been before a place where the lowly, however lowly, could become the greatest, where any may pass from the lowest rung of the ladder to the highest without let or hindrance. Where has the world ever before seen, for every man, the same chance for physical comforts, for intellectual and religious freedom, for satisfaction of ambition and of ideals? Here the common man has lived better than the mighty of other ages.

We can particularize, very briefly. The League of Nations publishes statistics—a limited reference to them. In 1930, the most recent calculation available, the real wages of him who labors in the United States had purchasing power greater than in the eight great European nations selected for comparison, in ratios varying from two to one, to five to one. Based on the purchasing power of twenty-three items of foods, there is a comparison favorable to the United States varying from five to three, to four to one. Wages earned in America buy, of the necessary foods, out of his day's wage, four times as much as the wages of the laborer in Italy, three times as much as in Germany.

We have further current confirmation of the blessings of America. It has been said: "The Cavalier of Virginia and the Puritan that landed on Plymouth Rock builded a civilization that is the envy of the world. There has been no statesman able up to now to suggest in the form of a government a single improvement upon the government laid down by our forefathers."[14] The statement is by a much noted gentleman from Alabama, as quoted by the North American Newspaper Alliance, Inc. It isn't suggested that this statement is to be given equal weight with the other evidence adduced herein; but this speaker, too, has had concern with the Supreme Court of the United States and with the Constitution.

That our people forget all this, when, as must everything earthly, prosperity wanes, denies no facts; it merely enables careless men to pretend forgetfulness and lead the less tutored toward destruction.

Who made all these blessings possible for America? Who have written its laws? Who have carried them into effect—who have construed them? All who read history know the answer. Does someone say that we have become great because of our material resources; that freedom and comfort and absence of class go with an undeveloped country? Are not many other parts of the world possessed of the greatest of material resources? Have not many other lands the richest of soils? Was not the wealth of the earth once assembled outside the borders of the United States? Have material comforts, freedom of worship and individual blessings been achieved in any of the countries to the degree that they have been won in America? Where else, in all the world, have the blessings open to every man, present every day, so blossomed as in the United States?

Will you pardon a few statistics? Figures can't be garnished with fine phrases nor wreathed in promises; but they speak volumes to those who, having ears, will listen. We shall not delay you long. For illustration we select some of the crises of American history. Time doesn't permit more. A complete recital of all the events of America may not be here made. We have been at war five times since we attained freedom. During those crises, forty-seven Secretaries of State served us; forty-four were lawyers. You will recall that more

13. See "Life in a New England Town, 1787, 1788."

14. Words of Hiram W. Evan, Imperial Klan Wizard, as reported by North American Newspaper Alliance, Inc., in newspapers of September 16, 1937.

than two-thirds of our Presidents have been lawyers. Lawyers, when they become Presidents, are still of the profession; we claim them and their works. If there are liabilities attached to that claim that Presidents are a part of us, we accept the burdens, knowing how great is the offset of credit, the total balance taken. During those five crises, there were seventy-two Cabinet officers; five-sevenths of them were lawyers. Does someone ask about those who served at such times in Congress? You will discover that 2,122 men were elected to those offices; there, too, five-sevenths were of the legal profession. 1937 has not been included in the critical periods; but in the Senate of the United States there were seventy lawyers. The records throughout the one hundred and fifty years of our existence will give you the same proportionate record of devoted leadership.

If there is dissatisfaction with what America is, from the perspective of the rest of the world, for that result the lawyers may be blamed. But if America is blessed beyond the rest of the world, just as we would take the blame, we ask the gratitude of America for her lawyers. If for one hundred and fifty years America's welfare has been defeated, the lawyers may properly be described as those who led in the defeat; theirs is the blame. But if the answer is otherwise, to them belongs the credit. We can be certain of the world's verdict on that issue.

There are other landmarks in American history. May I remind you of some of them? A treaty formally ended the Revolution; John Jay was chairman of our negotiators. Perhaps you think of the acquisition of new territory; Jefferson was chairman of the congressional committee dealing with the first Northwest Ordinance, of 1784. It was Jefferson, the President, who arranged the Louisiana Purchase. Madison was President when Florida revolted from Spain and became a part of the United States. The Monroe Doctrine—that has kept Europe from American shores. It was a lawyer's idea, a lawyer's accomplishment. When Texas was admitted, a lawyer was President, John Tyler. Henry Clay did his utmost to avoid the Civil War. His compromise delayed that unhappy event. A great educational movement was started in this country by Horace Mann, of our profession. We hardly need speak of Abraham Lincoln. What he was, was in great part because he had been a lawyer. You will remember Samuel Tilden. It was he who led the prosecution of that political ring in New York, managed by Tweed, so disgraceful to the City and State of New York, and who was so completely destroyed by the work of lawyers. Have you been in favor of civil service? It was a lawyer, George H. Pendleton, as chairman of a Senate Committee, assisted by another lawyer, and executed faithfully by a lawyer President, who established civil service. It may be that you like to think of those who, according to the rules of the age, were unconventional. You will remember the lawyers among them, Andrew Jackson, General Weaver of the People's Party, William Jennings Bryan, and Robert LaFollette, Sr. Will these men be charged today with a desire to defeat the ideals of America? Look where you will in the history of America. Examine what you may of everything that has been done to make America great, and there you will find, as leaders, men of the law.

All this in mind, count the number of lawyers. Shall we take the present? Earlier generations would give even more startling results. Shall we say we have 130 million people? There are no more than 160,000 lawyers in active practice. One-eighth of one per cent of all our people, one man in every 800. Entitled, proportionately, to one leader in every 800 in governmental affairs, this profession of the law has generally had nearly five-sevenths, say 575. I'm not a mathematician. What is the excess above a normal proportion? 57,000 per cent? Is it to the credit of a profession numbering one in every 800 to have had five-sevenths of all those who have made the laws of America and who have brought her to the happy position which America occupies? Lawyers may have been the reason for defeating schemes proposed by some, but not the destiny of America; they have made America whatever America is. The downtrodden of the rest of the world, knowing their own conditions, would with difficulty be persuaded that these leaders of the United States have sought defeatism for their people. Eliminate the lawyer from the American scene, if you will. Doing so, you level all her mountains of accomplishment; you take away the rivers which fertilized her soil; you destroy the foundation on which her liberty was built; you tear down her defense against tyranny; you nullify her Bill of Rights; what would be left would not be America, only a shadow of her greatness. Who, among you, doubt that the people will trust us, when you tell them the truth?

ELWOOD HUTCHESON
Winner of Essay Contest under Ross Bequest

SIXTIETH ANNUAL MEETING MAKES RECORD OF CONSTRUCTIVE ACCOMPLISHMENT

Machinery Provided by New Form of Organization Put to Effective Use by House of Delegates and Assembly—Attendance Breaks All Records—Committee Appointed to Keep Vigil in Behalf of Independent Federal Judiciary—Referendum on Child Labor Amendment, etc., Ordered—Open Hearings on Judicial Nominees Asked of U. S. Senate—Law Lists and Other Problems Effectively Dealt with—President Stinchfield's Annual Address Appraises Work and Worth of American Lawyer in American History—Other Notable Addresses—Proceedings in Detail—President Vanderbilt Begins Work for Coming Year

THE Sixtieth Annual Meeting, the first to be convened under the new structure of the Association, made a record of constructive accomplishment. The criticism sometimes heard as to earlier meetings, that the Association merely brought lawyers together, carried out an agreeable social program, provided a platform for a few outstanding addresses, and produced only the poorly-considered passage of a few general resolutions which everyone soon forgot, could not be made as to the earnest and dynamic gathering of lawyers who constituted the House of Delegates and thronged the Assembly and Section meetings in Kansas City, to transact the Association's business and to see to it that its decisions were advanced along practicable lines.

The meeting was a natural but gratifying development from the Boston sessions in 1936 and the mid-winter meeting of the House of Delegates last January. The foundations for a broadened and heightened interest in the Association had been soundly laid. The total attendance registered was larger than at Boston, but was affected by the lateness of the time of meeting. Every State was well represented, in the House of Delegates as well as in the general attendance; but an unusually large part of the registration came from the region in which the meeting was held, particularly from Missouri.

The constructive and at times militant spirit of the meeting reflected unmistakably the representative character of the Association as now organized, and also the confidence of its membership that the Association can be of substantial public service as to matters within its field. Beyond a doubt, there is taking place a marked change in the views held by American lawyers, as to what their National organization is and should be, and as to what it is doing and can do. There is a growing recognition, not only that the profession is organized to aid the public as well as its members in positive and practical ways, but that it now has available the necessary machinery for enlisting broad and representative support and for pointing its actions toward worthwhile results.

Interesting and significant in its psychology and background was the fact that one of the most important actions taken in Kansas City, involving the most controversial issue lately before the country, evoked no opposition and aroused no stirring debate. The Assembly and the House of Delegates approved unanimously the recommendations of the Special Committee on the Supreme Court Proposal. The reasons for this unopposed action were plain: So well had the Committee headed by Sylvester C. Smith, Jr., done its work and so adequate and suitable were its recommendations for continued defense of an independent judiciary, that the report met a hearty and universal response among the members irrespective of political faiths. Such constructive and patriotic recommendations did no more than put to paper the views deeply held by nearly all of the Association membership, and so were approved unanimously upon presentation.

The summaries of the things done at this annual meeting appear elsewhere in this issue and show the constructive character of the Association's work. The action taken for a referendum on various present phases of the Child Labor issue is covered by the informative article which begins this issue. The Assembly gave consideration to one of the most difficult problems brought before the meeting, and originated a resolution, which it adopted with the concurrence of the House, whereby the Association petitioned the Senate of the United States to adopt a rule requiring full public hearing by a Senate Committee, before confirmation of any nomination for Federal Judicial office. A needed revision of the Canons of Ethics was accomplished by the House; and the machinery and standards were set up for making a start in handling the problems created by law lists. An examination of the whole record of things done will show a like constructive purpose in the decisions reached, and will emphasize the fact that President-elect Vanderbilt, in putting the public interest foremost in his remarks at the fifth session of the Assembly, was not setting up a new test of the worth of the Association's work, but was reaffirming and vitalizing the standard already in force.

But this work done by the House and Assembly by no means summed up the accomplishments at Kansas City. The sessions of the Sections and hearings of Committees were important and interesting. A glance at the programs of these bodies shows the multitude of problems in different fields of law which are being studied by these related agencies of the Association, for the purpose of reaching conclusions on which the House, the Assembly, or the membership, will finally pass.

Never before have these agencies been so active or so well attended. Their sessions were really conventions of moderate size, in themselves. It is to be regretted that space is not available to give their proceedings in the *Journal*. The Annual Report Volume will constitute the complete record of the meeting.

The addresses delivered showed that the working ideal of an Annual Meeting does not mean the sacrifice of the element of interest which distinguished speakers contribute. President Stinchfield's annual address, "We Examine the Record—of the American Lawyer," was a demonstration of the growing consciousness of professional responsibility. A profession has responsibilities and duties, to the public and to itself, and among these is a purpose to see that its character and its aims are not misrepresented.

Judge Hatton W. Sumners, Chairman of the Judiciary Committee of the House of Representatives, spoke informally but with deep conviction, of the crisis which confronts the nation and of the need for the people to realize that the future of the country depends on their vigilance and patriotism. His address made a deep impression. President Hutchins, of the University of Chicago, contributed richly to the program, in an address which set forth his views as to the sort of education a young lawyer should receive, to enable him to measure up to the ideal of a member of a profession whose primary object is to do justice. Honorable E. K. Williams, K. C., gifted representative of the Canadian Bar Association, spoke on "The Lawyer's Wife," at a luncheon meeting of the Assembly, and his address accentuated the cordiality of understanding between the Bar of the United States and that of Canada.

Two great dinners of the membership featured the meeting. Both were held in the vast arena of the Municipal Auditorium, and were the occasions for addresses of special interest. Former Governor Joseph B. Ely of Massachusetts, spoke at the dinner of the Association Monday evening, under the auspices of the Judicial Section and National Conference of Judicial Councils, over which Chief Justice Weygandt of the Supreme Court of Ohio presided. He expounded, in his usual trenchant way, questions confronting American institutions and the dangers he found inherent in recent tendencies; and his audience paid him the tribute of close attention and hearty applause. At the annual dinner Thursday evening, Senator Edward Burke, of Nebraska, and Honorable Ernest Palmer, Director of Insurance, of Illinois, made addresses. Senator Burke's address sounded a broadly non-partisan call for continued vigilance to protect the judiciary against further attack. As an outstanding protagonist of an independent judiciary in the recent historic contest, Senator Burke was welcomed and heard with great cordiality. Mr. Palmer took as his subject: "Rest Assured," and mingled humor and good insurance principles in a highly interesting and informative combination.

President-elect Vanderbilt's address at the Fifth Session of the Assembly gave further evidence of the energy and business-like attitude of the Association and its leadership today. Instead of merely accepting, in a few formal words, the great honor bestowed on him, he aptly used the occasion to give immediate impetus to the Association's work, by an earnest declaration of his point of view and purposes as to several of the imminent problems. Before the members had left Kansas City, he had personally assumed the leadership in many projects; and he was able to forestall the customary let-down in activity after the adjournment of an annual meeting. He broke another record by having his committees appointed and functioning, with one or two exceptions, before the adjournment of the meeting, thus eliminating another usual cause of delay in getting down to the year's business.

As to Kansas City, it was a revelation to visitors who did not know its generous hospitality, its remarkable facilities for holding large gatherings, its plentiful hotel accommodations, and its many attractions. Members felt themselves in the house of their friends almost on arrival; and nothing that friends could do to make the sojourn of friends agreeable was omitted by the generous and capable hosts. The resolution of thanks tokened, but could not fully express, the hearty appreciation of officers and members for all that was done to make their stay agreeable and their work worth while. A series of large local committees worked together to produce the unusual result of an Annual Meeting and an entertainment program without a hitch or a dull moment. At the head of them was the Executive Committee: Charles L. Carr, Chairman, John F. Rhodes, Vice-Chairman, Albert F. Hillix, Treasurer, Frank P. Barker, Robert B. Caldwell, Charles M. Howell, Sr., Fred S. Hudson, and J. Francis O'Sullivan; and the thanks of the association not only extend to them but to the Chairmen and members of other Committees, and to the public-spirited organizations they represented.

For the entertainment of the visitors there was a great variety of functions. There were trips through the beautiful Country Club district of Kansas City, with its revelation of effective residential district planning; through the remarkable industrial section of the city, with its tangible evidences of Kansas City's greatness in this respect; to the William Rockhill Nelson Gallery of Art and Mary Atkins Museum, with their remarkable collections; through the Jackson County countryside, with visits to "Unity Farm," which seems to be an experiment in community living and thinking, and "Long View Farm," which, with its racing stables and immense domain, is really one of the show places of the country; and to Leavenworth, Kansas, where the Federal Penitentiary was inspected and Fort Leavenworth was visited. On Wednesday there was a polo game at the Country Club.

Sunday evening there was an enjoyable informal reception by President and Mrs. Stinchfield at the Hotel Muehlebach for new members and members attending an Association meeting for the first time. On Monday evening the President's annual reception, followed by dancing, was held in the Arena of the Municipal Auditorium. There was also a Junior Bar stag smoker and a formal dinner for visiting women lawyers given at the Women's City Club under the auspices of the Women's Bar Association of Kansas City. The delightful conclusion of a notable meeting came when an audience of more than 15,000 persons filled the arena of the great Municipal Auditorium, and listened to a diverting "floor show" for which Rudy Vallee was the competent master of ceremonies.

First Session of Assembly—Association Welcomed to Kansas City—President Stinchfield Delivers Annual Address—Proposed Amendments to Constition and By-Laws Approved—Speaker Mentions Three Anniversaries Which Association Is Celebrating

THE great Music Hall of the Municipal Auditorium is filled, as President Stinchfield calls the Assembly to order. This is the first annual meeting of the Association under its new plan of organization, and it begins auspiciously, with manifestations of interest and enthusiasm. The Mayor of Kansas City and the spokesmen of the State and local Bars welcomes the Association to Kansas City and Missouri with a cordiality which succeeding days make more tangible and manifest. Former President Loftin takes the Chair, pays a tribute to President Stinchfield for his efficient, able and highly successful administration of the Association's business during the past year, and then introduces him. President Stinchfield delivers his address, "We Examine the Record—of the American Lawyer." The profession is not content to pass misrepresentations over in silence. The record shows its great service to the country. Amendments to the Constitution and By-laws of the Association are approved by the Assembly.

PRESIDENT STINCHFIELD called the Assembly to order in the Music Hall of the Municipal Auditorium. The Hall was filled with an interested audience.

"In a city and State where the signs of welcome are already very clear, very warm," President Stinchfield said, "the Sixteenth Annual Meeting of the American Bar Association is now called to order. It is with great pleasure that I present to you a gentleman whom a very large part of you know, the Mayor of Kansas City, Honorable Bryce B. Smith."

Mayor Smith Welcomes the Association

Mayor Smith was greeted with applause and spoke, in part, as follows:

"Mr. Chairman and Members of the American Bar Association: It is my privilege as the Mayor of Kansas City to welcome the Sixtieth Annual Meeting of the American Bar Association. Kansas City hopes that this will be the happiest and the most successful meeting of all those which you have held. With world conditions changing so rapidly, it is eminently proper that you men who have so great an influence on legislation should study, then meet, discuss and most seriously consider what is best for the public and your profession.

"Someone was kind enough to send me a copy of the advance program of the American Bar Association, including the committee reports to be presented for action at this Sixtieth Annual Meeting. A hasty survey of the reports of the standing and special committees shows that the members of your Association have been giving much careful thought and consideration to many of the serious questions that are confronting our nation today. As I read through the advance program, many committees on subjects of which I have some little knowledge showed me the broad interests and the great activities of your Association. I notice that there is a Junior Bar Conference, which I take it includes and encourages the younger men to participate in the activities which heretofore have largely been left to those who have been longer engaged in the profession.

"I was particularly interested in the reports of the Committees on the Unauthorized Practice of Law, Professional Ethics, and the Economic Condition of the Bar—three matters which to me, a layman, seem particularly related. If the unauthorized are allowed to practice law without being governed by the ethics of your profession, certainly and surely the moral and economic conditions of the bar will reach a most serious state. And then, again, permitting such a condition to exist has a terrible effect upon the public as a whole. This is a problem, as I see it, where the rights of the public and the interests of your profession are just about the same."

Mayor Smith then outlined the steps which the Supreme Court of Missouri had taken to deal with the subjects—steps which the public, the courts, the lawyers and the newspapers of the State thoroughly approved—and concluded by repeating the welcome to Kansas City.

President Teasdale Speaks for Missouri Lawyers

President Stinchfield then introduced the President of the Missouri Bar Association, Honorable Kenneth Teasdale, who said, in part:

"The lawyers of entire Missouri, welcome you here today, and we welcome you with a feeling of pride and a feeling of humility. It is a natural and just pride that any community, any State, any city would feel to have this body of learned ladies and gentlemen here to discuss their affairs. It is touched, of course, with a strong feeling of humility. We are humble when we think of the dignity, the power represented here, and we are more humble when we think of the obligation, of the duty that that power, dignity and capacity beget.

"We cannot have this force and capacity, we realize, without that corollary of a tremendous obligation to ourselves and to the people of this nation. Feeling that way, it may be of interest to us to see what duty confronts us. Since we have powers and capacities, since we have obligations as a result thereof, what great tasks of the nation or of universal interest face us? . . .

"If I should, with all humility, undertake to give a consensus of opinion of what lawyers of Missouri are thinking about these days, it would be something like this: that democracy is sore troubled these days; it has its enemies without, as always, but it has its enemies and its weak friends within. It is being undermined by both its friends and its enemies. No doubt these days there are people who sincerely feel that democracy does not meet the test, that it is lacking in some

force or efficiency, and is not a form of government that can persist.

"There is even a larger group than those we have in mind, who feel that, while democracy represents perhaps the highest form of government, the most desirable form of government that political philosophy has evolved, none the less it cannot withstand the threat of force from without. When emphasis is placed upon brutality, when it is a nation's desire to build up fear and hatred and bring out those worst pre-civilization elements in us, when force has become the dominant factor, many people sincerely feel that perhaps democracy cannot stand up against that sort of opposition.

Can Democracy Withstand Its Enemies?

"Can it or can it not? We do not know, but we do feel this—these lawyers of Missouri—that in order to withstand this threat, democracy must be fully armed, must present a strong phalanx, it must be able to exert its very mightiest power in order to withstand the assault. Are we in a position, is our democracy functioning so nearly in accordance with the ideal concepts of democracy that we can say we are prepared for battle, that we are able to cope, to our fullest strength, with the competitive philosophies that are here? I doubt it. We know, of course, that the primary need of democracy is that the electorate are militant, are universally and eternally interested in the preservation of our institutions, and are running the affairs of their country.

"We know that any government, any system of government, must give to its citizens a strong judiciary that will satisfy that innate and instinctive craving for justice that people have. We know that the legislative branches must be responsive to the needs and the will and the desires of the people. But what do we find about us as we make a survey? We see the judicial branch of many large cities so inadequate to meet the needs of the people that the movement grows apace to find new methods of selection and new ideas of tenure of judges in larger communities particularly. We see, as regards the legislative body, the movement for the unicameral house, the movement to curtail the power and to shorten the tenure of the legislative body and legislative officers growing in strength daily.

"We see, also, officials of political parties, in wards and precincts and other subdivisions, by control of the vote of the people, being able to dictate who will be the legislators, who will be the other officials, minor and major, and who, in some instance, will sit on our judicial benches. It means the taking away of power from the people and lodging it in the hands of those who are irresponsible, or quite apt to be, and quite apt to be motivated by forces other than the desires and interests of good government.

"And what does it behoove us to do about these things, if that is somewhat a correct analysis of the situation? It seems to the lawyers of this State, as I analyze their views and get the consensus of them, that they present a great crisis; it seems to us that as important as other things confronting us may be, this is perhaps the most fundamental, the most important. Fresh from a victory, an extensive one that may have to be refought, a victory in the battle against encroachments on our ideas and ideals of the judiciary, against encroachment on our Constitution and its doctrines, it is perhaps a shame we must do battle again, but I think it is necessary, I think it is fundamental, I think it is inescapable.

"I think the people of America feel that no other body, no other group, no other profession, can as adequately perform the service that is needed as can this group, as can we lawyers. They feel that democracy must put its house in order, to use a trite phrase, that we must again restore it to something like its original, idealistic vigor; we feel that we have got to remold it and make it so it will function and so that we can go into this battle, if I may continue this figure of speech, not only full-armed but sustained by faith, your faith, that we are doing the just and the proper and the fair thing, that we are not being motivated solely by traditions and in service to a cause in which we do not believe.

"Feeling those things, I believe we can render a tremendous service and I believe that if we do not render this service, we shall have failed in a great mission, we shall have failed the people of the United States."

Senator Reed Delivers Address of Welcome

President Stinchfield introduced that well known citizen of Missouri, Ex-Senator James A. Reed, who represented the local Committees of the Bar of the City and State, in welcoming the Association to Kansas City.

In his address of welcome Ex-Senator Reed said, in part:

"The honor has been assigned to me of representing the Bar of this City and State in a formal expression of gratitude to the American Bar Association for the compliment paid by convening here.

"We hope you will enjoy your visit here and our good wishes will attend you, when at the conclusion of your deliberations, you view the government penitentiary as disinterested observers and are permitted to return safely to your homes and loved ones.

"We recognize that, unlike many conventions of other organizations, you do not come to promote any business, trade or occupation. This convention was not called to advance the emoluments and profits of the legal profession. No man is here that he may put money in his purse. On the contrary, you have left your homes and offices inspired by a patriotic desire to promote the stability and glory of our country and to insure the blessings of liberty to ourselves and to the shadowy hosts who yet shall march across this bank of time.

"When such are the impelling reasons for an assemblage of delegates gathered from all of the States of the Union and from Canada and representing the greatest of the professions, admiration is necessarily challenged. But when we also realize that those exalted motives are entertained by men and women who possess a comprehensive knowledge of the history of mankind, the rise and fall of republics, the enslavement of free men by rulers who have destroyed the temple of liberty and out of its ruins erected the citadels of tyranny, then such a gathering takes on an immeasurable dignity and importance. . . .

Senator Reed expressed criticisms of recent and present conditions, and continued:

"I salute you as the doctors of the law, the protagonists of the Constitution, and the defenders under the Constitution of the rights and liberties of 130 million men, women and children—a vast population who without the Constitution would be the victims of every wave of fanaticism, every tempest of the mob, every ambition, and every seduction of hypocrisy. To cross the threshhold of your profession you took solemn oath to faithfully demean yourselves as officers of the courts of justice and to preserve and defend the Con-

stitution of the United States and of your respective States against all enemies, foreign and domestic.

Lawyers as the Watchmen on the Tower

"As the general of an army or a soldier of the line is bound to hurl back the assaults of the enemies of his country, so is the lawyer by his oath and profession bound to resist the encroachments of all who, by subtlety or force, seek to undermine our free institutions or to impair the liberty of the humblest citizen. The lawyer ought to be and the lawyer is the watchman upon the towers, in duty bound to signal the advance of the enemy and arouse the people to the defense of their rights . . .

"The Constitution is the law of the people. It springs directly from their authority. It is the measure of authority of all federal office holders. There could be no Congress except for the Constitution. There could be no President except for the Constitution. And from the same Constitution the rights and authority of the courts are derived. Destroy the independence of the judiciary and the Congress becomes omnipotent. It will be the judge of the constitutionality of its own

acts. Its will is substituted for the will of the people who created it and who solemnly limited its authority.

"Whether the Congress has exceeded its authority must necessarily be decided, not by the body which is accused of violation, but by an independent tribunal. The essential of all courts of justice is that the judges shall be disinterested and without bias or prejudice and hence capable of rendering an impartial decision. The Courts not being the authors of a law or concerned in its passage, are alone qualified to determine whether the rights of the citizens have been invaded by legislative or executive action. The destruction of an independent judiciary is the death of constitutional liberty.

"An attempt is now being made to undermine the authority of the Court by requiring a two-thirds or three-fourths vote in order to protect a citizen against the invasion of his rights as ordained in the Constitution. The rule of a majority vote has existed for a century and a half and doubtless there ought to be no change. But it would seem that if a change is to be made it should be in the opposite direction, for if an Act of Congress is so near an invasion of the rights of a citizen as to create a reasonable doubt as to its constitutionality, then the doubt ought to be resolved in favor of the liberties of the citizen and the adverse opinion of a minority of the Court might well be taken to raise such reasonable doubt. In its last analysis those who seek to establish a two-thirds rule want

to make a majority vote in Congress superior to the people's Constitution.

Circumstances under Which Court Acts

"It is interesting to note what are the limitations upon the power of the court. It can enact no statute. It can promulgate no rule having the force or effect of an affirmative law. Its powers are purely negative. It can only act when some citizen of the United States asserts in a case duly brought that some right secured to him by the Constitution and laws has been violated, and it can only decide in that case whether such rights have been violated. I repeat, it does not make laws. It decides whether a legislative body has violated the great fundamental law of the people. Its prerogatives are in the last analysis purely defensive. . . .

Senator Reed continued with an earnest statement of what he believed to be the purpose of the Constitution to protect the rights of the minority against the will of an oppressive majority, and closed with this: "The Constitution of the United States, bulwark of liberty; the Courts of law and justice, buckler and shield of the Constitution—may they endure forever!"

Mr. Wyman Responds for Association

President Stinchfield announced that the immediate response to the address of welcome would be made by Mr. Louis E. Wyman, of Manchester, N. H., a member of the Board of Governors of the Association. Mr. Wyman spoke briefly of the atmosphere in which the lawyer does his daily work, of the demands made upon him in his task of representing his clients, and then continued:

"But here, as we meet in our Association convention, in this great city in the very heart of our country, we have no clients; we constitute ourselves judges of what the law and its practice should be; we are again at school, each seeking to learn and to teach the law at its best as we understand it, for the common good not only of ourselves but also of our communities.

"It is pleasing to think that perhaps your welcome is the more sincere because you recognize the spirit of public service that motivates this Assembly. As I represent my brethren of the Bar in thanking you for this welcome, these my clients, these men and women here gathered for serious purpose, demand of me that I assure you, the good people of Kansas City and the entire country, that we will do our best by the intensity and disinterestedness of our efforts and by our accomplishments, to prove ourselves worthy of the effort you have made to provide for our welfare while here.

"In the old days, the integrity and learning of the country squire made him a respected leader. We who have faith in the value of Bar Association activity believe that through such conventions as this the collective legal mind of the country can earn and is entitled to the respect of the Nation. We thank you for the chance to show what we are and what we can do in Kansas City."

Mr. Frank J. Hogan's Response to Addresses of Welcome

President Stinchfield then introduced Mr. Frank J. Hogan, of Washington, D. C., Delegate of the District of Columbia Bar Association in the House of Delegates, who made the further response to the addresses of welcome. Mr. Hogan said, in part:

"Our appreciation of your generous welcome, extended to us with such eloquence and impressive authority, has been so well expressed by Mr. Wyman that I would be content to exclaim 'Them's my sentiments' and let it go at that.

"It has been said that the truest test of friendship is the ability of friends to spend time contentedly together without saying a word. Whether or no that be true I cannot tell. I never tried it. And by the end of this week all Kansas City will know that in the American Bar Association we do not put friendship to that test.

"We celebrate three anniversaries at this meeting:

"The 150th anniversary of the signing of the Constitution which every lawyer takes a solemn oath to support;

"The 60th anniversary of our Association organized to 'promote the administration of justice and uniformity of legislation and of judicial decision throughout the nation and uphold the honor of the profession of the law';

"The first anniversary of our new Constitution, by which the organization and structure of the Association were completely changed.

"By action taken in Boston one year ago, control of the American Bar Association was placed in a House of Delegates, composed of the elected representatives of about 100,000 lawyers; and there was provided a readily available procedure for obtaining the decision of the rank and file of the profession by mail ballots on questions of major importance. During the year this democratic method of finding out the views and wishes of the whole profession, with non-member lawyers voting as well as members, was most effectively used.

"It is gratifying to note that the Committee dealing with the Child Labor question recommends to this meeting that a referendum be had to publicly register the profession's sentiment on the subject of overcoming by law the manifest evils of child labor. There has been widespread misrepresentation of this Association's position on the question. The lawyers of America are not, and never have been, opposed to effectively limiting the commercial employment of child labor, or to absolute prohibition of the exploitation of children in industries. Opinions differ only regarding method—whether Federal or State legislation may be most effective, and whether for the former a constitutional amendment is needed, and if needed, its scope.

The referendum procedure which so lately enabled the Nation and the Congress to hear the voice of the legal profession is at hand to make heard that voice on every vital question on which our position should be clear. Let's use it!

First Test of the New Organization

"This is not just another convention. There is real significance and purpose in the coming together of so many American lawyers at this time. We here, in the heart of the nation, will have the first real test of our new organization. Its central idea is to get away from mere forms and ceremonies, mechanics and motions, and to get down to brass tacks, taking specific and effective action on important matters which affect the country, the profession, the courts, and the administration of justice. And in doing this, in the most practical way, we are now set up so as to give the lawyer, who cannot attend meetings away from home, a larger and broader part in the decision of the policies of the Association, by affording him opportunity to express his views at home.

"And that is good, for the American Bar Association is the representative and inclusive organization of the legal profession. It is made up of lawyers of all

political parties, all religious faiths, all sections of the country—lawyers of all sorts of views on all sorts of questions. It is—as it should be—a forum in which every lawyer is free to express his own opinions—and usually does. All varieties of views are expressed by those who address our meetings. They are the views of the individual speakers, not of the Association. Its views are decided and expressed only by its House of Delegates, or, on major questions, by the direct votes of the rank and file of its members. . . ."

Mr. Hogan closed by a reference to the immemorial habit of lawyer-baiting, which has been taken up actively again, with the use of the most modern methods of publicity. In this connection he gave some striking figures in answer to the charge that the Bar has lost its former leadership in public affairs.

For instance, he said, in the last Congress 74 per cent of the Senate, 58 per cent of the House, and 61 per cent of the Congress as a whole were lawyers. In the first Congress, however, only 43 per cent were lawyers. "When we turn to the States," Mr. Hogan continued, "and combine them with the Nation, we find that over 70 per cent of those in legislative and executive offices are chosen from among 175,000 lawyers, out of a population of 130,000,000 people." The point that there was nothing here to indicate decrease of public esteem or public leadership was reinforced by other figures, equally striking.

At the conclusion of Mr. Hogan's response, President Stinchfield remarked that at this point in the Annual Meetings it was customary and desirable for the President, before delivering his address, to resign the gavel, be introduced, and then proceed to deliver it. He therefore presented a former President, the Honorable Scott M. Loftin, of Florida, who spoke briefly as follows:

"You know that this is the first year the American Bar Association has functioned under the new constitution and by-laws. It has also been a momentous year for the bench and the bar in the history of our nation. We have indeed been fortunate during this difficult period in having a leader who has measured up in every way to every responsibility that has fallen upon his shoulders. Notwithstanding his duties have been somewhat new, unusual, and uncharted, I think you will agree with me that his administration of the affairs of this Association has been most efficient, most able, and highly successful. In a word, and without further eulogy, his record has been one of credit to himself and honor to this Association.

"I am now very happy to present to you the Honorable Frederick H. Stinchfield, President of this Association, who will deliver the annual address, the subject being, "We Examine the Record of the American Lawyer."

President Stinchfield Delivers His Address

President Stinchfield was received with most cordial applause, and thereupon delivered his address.

Secretary Knight at this point presented the proposed amendments to the Constitution and By-laws of the Association. These had been duly published in the JOURNAL. The first proposal was to amend Article V, Section 5, of the Constitution, by "staggering" the election of State Delegates, so that one-third would be elected each year. The second proposed amendment was to change the name of the Judicial Section to "Section of Judicial Administration." Both of these came before the Assembly with no recommendation from the Board of Governors. The third proposed amendment was to Article II of the By-Laws, and it authorized the Board of Governors to create "sustaining memberships" of the Association. With a slight change of wording, the Board of Governors had approved this amendment.

The amendments were thereupon read by the Secretary and successively adopted.

The Chair thereupon announced that under Article IV, Section 2, of the Constitution, the time had arrived for offering resolutions on any subject as to which members desired action by the Association. Some fifteen resolutions were offered from the floor. These were referred, without debate, to the Resolutions Committee for public hearing, consideration, and later report.

The Secretary announced that because of absences, there were two vacancies in the representation of the Assembly in the House of Delegates. Three nominations were made and the ballots distributed. Congressman Walter Chandler of Tennessee and Mr. Robert F. Maguire of Oregon were elected Assembly Delegates, to serve during the 1937 meeting. The Assembly thereupon adjourned.

Second Session of Assembly—Statement About Work of American Law Institute—Report of Committee on Child Labor Amendment—Report of Committee on Supreme Court Proposal—Jurisprudence and Law Reform Committee's Recommendations Considered

THE Assembly leads the way in putting the stamp of approval on the work of the Special Committee on the Supreme Court Proposal. It unanimously adopts the Committee's recommendation for the appointment of a Special Committee to continue advocacy of the views voted by the Association's membership in behalf of an independent judiciary. It provides for a referendum vote of the members in the event that substantial changes affecting the Supreme Court or other Federal Courts are proposed and under serious consideration at a future session of Congress. It approves legislation to provide an additional method for the removal of Federal District Judges—by trial in a statutory court composed of seven Circuit Judges. It approves the Rules of Civil Procedure now before the United States Supreme Court, subject to modifications which the Advisory Committee might see fit to recommend. It hears a statement as to the work of the American Law Institute and is interested in the extension of the work of that organization into the statutory field.

It hears the report of the Committee on the Child Labor Amendment, recommending a referendum

on the pending amendment, the proposed alternative amendment, proposals to deal with the subject by Federal and State legislation, and upon any other related matters upon which the Committee may desire instructions. Speakers refute the unfounded accusation that the Association has been opposed to proper action by Constitutional Amendment or Federal and State Legislation to deal with the subject. The Assembly votes to table the report and recommendations. However, the House of Delegates later approves the Committee's recommendations and orders a referendum, and the mover of the resolution to table in the Assembly declares himself satisfied with such action.

THE second session of the Assembly was presided over by former President Guy A. Thompson. The first business was the election of the five Delegates of the Assembly to the House of Delegates. Hon. William L. Ransom, of New York, Judge A. B. Lovett, of Georgia, General J. Weston Allen, of Massachusetts, Mr. John F. Rhodes, of Missouri, and Mr. Grant B. Cooper, of California, were nominated and unanimously elected.

Chairman Thompson announced that the next business on the program was a statement concerning the work of the American Law Institute, which would be made by former President Henry Upson Sims of Alabama, a member of the Council of that organization. Mr. Sims spoke in part as follows:

Statement Concerning Work of American Law Institute

"The President and the Director of the Institute asked me to express to you, and through you to the members of the Assembly and the Bar Association, generally, their regret, each individually, at not being able to come. They expressed the same interest in coordinating the work of the Institute with that of the American Bar Association and appreciate the courtesy always rendered the American Law Institute by putting a representative of the Institute on the program at an appropriate time. . .

"The Institute, as those of you who go to it know, has now eleven volumes of the Restatement of Law in your hands, fully published. How rapidly they will come from now on, it is impracticable to state, but there will probably be a third volume of the Restatement of Torts this next year; a volume on Restitution and Unjust Enrichment—there won't be time to explain that—either this year or next year, according to the order of precedence which the Executive Committee may decide upon; a third volume of the Restatement of Property the year after. There will probably be another volume of the Restatement of Torts before that is finished; there will be probably two volumes of the Restatement of Property in addition to the two already out, before the scope of the subject of Property has been restated sufficiently to say that it would be better not to attempt to elaborate further.

"The Institute is still supported, as you know, by the Carnegie Foundation. The late Elihu Root in 1923 was able to present to the Foundation the value of the sort of work which the Restatement had in view, and ever since then they have supported us. Without it, or the support of some other foundation, this great work could not progress at all. At present we have received something like $1,600,000 or $1,700,000, to do that work. We have still, besides the accumulated amounts, something like $100,000 for the purpose of restating Security, a subject which the Executive Committee and Council considered worth restating in the form in which the work has been done. After that, of course, nobody knows. That is one reason why the work cannot be broadened out more than it is, perhaps, but it is very difficult to get experts on subjects sufficiently interested in the work to be willing to devote the time to it.

Eight Groups of Experts Now Engaged in Work

"You will be interested to know that there are eight groups of experts in various subjects now working on the Restatement. To multiply that, of course, would mean to take from the universities a sufficient number of experts on other subjects which the Institute, with the advice of you and others interested in the work, would select, and have them devote two to four years' undivided attention to that one subject.

Mr. Sims then gave a brief explanation of what the Restatement is, and continued:

Institute Enters Statutory Field

"As to the utility of the Restatement, it soon becomes necessary to have annotations in the separate states because of the impossibility of having footnotes in any edition sufficiently broad and sufficiently elaborated to be of any particular value, and that has gone on and on until nearly all the states are doing that annotation well. Having reached that period and realizing the ephemeral character of a restatement, more ephemeral than a statutory enactment, the Institute has recently, quite recently, decided to use its experts in the various subjects to cover fields, which ought to be put now into statutory corrected state and these now constitute the cooperating committees.

"The Conference of Commissioners on Uniform State Laws responded at once to the suggestion, as that was their business anyway, and the result is that cooperating committees have been set up on air law which are doing sufficiently elaborate work to have an areonautical code in a short while before you; on property law for the correction of errors in the technical rules of property which have come down to us, and also for combining real and personal property in the statutory form which we hope the States will adopt. They are also working on a joint tort-feasor act, and on a liability for civil libel act.

"The work has just begun. If the Institute can get the money, as we hope we shall, it is ready to go forth into extended fields of the same corrective work that is now being done. There have been, of the published volumes, 10,500 court citations to date, and that is wonderful work. In short, I am glad to be, as a member of the bar, interested in the adoption by us all and by our courts of these things. And I hope in the next generation we will make the profession proud of what we have done."

At this point Secretary Knight announced that the registration for the next meeting had already reached an all-time high. The next business on the calendar was the presentation of the report of the Committee to Oppose Ratification by the States of the Federal Child Labor Amendment and to promote adoption of Uniform Child Labor Act. It was presented by the Chairman, State Senator James A. Simpson, of Alabama. The report had been printed in the advance program. Chairman Simpson said:

Child Labor Amendment Committee Makes Report

"This is the fifth annual report of your committee on this subject. The committee is a special committee and has been carried over five consecutive meetings of

this Association. During this year's work it has considered its chief task to be the charge of this Association to protect the Constitution against what this Association deemed to be the insertion in it of a matter of statutory nature rather than of constitutional nature.

"The Committee, however, under the instructions of this Association, has also devoted itself to an attempt at the solution of any problem or problems reported to it from the country at large, arising from abuses of child labor. Its work has been set out at length and in detail in a report which has been filed and which will be found on page 293 of your Advance Program.

"At your Boston meeting last year, this Committee pointed out to the Association a method of solving any abuses that might exist in the child labor field by legislation rather than by Constitutional amendment. Shortly before your Boston meeting the case of *Whitfield vs. Ohio,* dealing with convict-made goods, had been decided by the Supreme Court of the United States. It was suggested that goods made by child labor could be dealt with in that identical fashion."

"We are happy to report that since that time there has been introduced in the Congress of the United States a series of bills, and from them has been worked out what seems to be a combination from the Hawes-Cooper Act, and the Ashurst-Sumners Act, making possible the handling of child labor problems. That bill was pending before Congress when it adjourned and will probably be revived in the next session of Congress, making it possible for the States by supplementary and complementary State legislation to deal in a national and effective way with child labor products.

State Legislation Supplementing Federal Action

We are also happy to report that three states, the state in which we are meeting today, Missouri, the State of New York, and, I believe, Vermont, have already enacted state statutes to become effective when the national act is passed by Congress, meeting this situation. The New York Act is set out at length in our report. We have sent to the state legislatures in nearly every state where legislatures were meeting this year, suggested drafts of State acts. There seems to be almost unanimity of feeling among lawyers that this problem in such places as it does exist can be met by legislation.

"Some question has been raised in this Association's annual meetings from time to time as to the necessity for continuance or the advisability of continuance of this committee. As previously stated, four meetings of the Association have continued the committee. In recognition, however, of an honest, earnest feeling in the minds of many members of this Association that a broader basis for the work of this important committee should be made, your committee now recommends, and to get it before the meeting I wish to move, the adoption of a resolution continuing this committee for the coming year, and submitting its ends and objectives to a referendum under Section 5 of Article X of our new Constitution to the membership of this Association at large."

Committee Recommendations Read

Chairman Simpson then read the following recommendations of the committee and moved their adoption.

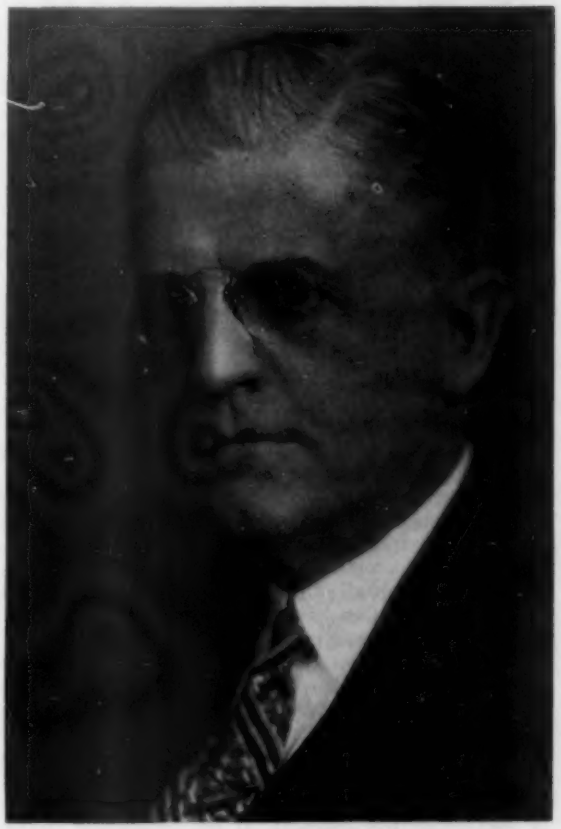
(1) That the Board of Governors be instructed to conduct a referendum vote of the members of the Association, pursuant to Article V, Section 10, of the Constitution of the Association, upon the pending Amendment, upon any proposed substitute Amendment, and upon the proposals to deal with the subject by Federal and State legislation and upon any other related matters upon which the Committee may desire instructions.

(2) That the results of such referendum vote, when taken and announced, shall constitute the instructions to your Committee and shall govern in all respects its actions and recommendations; and

(3) That your Special Committee be continued upon the above-stated basis.

Mr. Isador Lazarus, of New York, opposed the resolution, although he would have no particular objection if it were amended so as to leave out all of it which involved the continuance of the committee. He specially objected to the continuance of a committee with the one-sided label, "To Oppose the Child Labor Amendment."

Mr. Louis S. Cohane, of Michigan, thought it, "very important to make clear at this time, as a matter of decency and selfrespect of the American Bar, definitely and emphatically, what is our position. He said that it is a vile slander upon the lawyers of America and the American Bar Association, to say that the American Bar Association is opposed to a child labor amendment or to legislation which is well calculated and designed to abate and destroy the monstrous menace of the evils of child labor and commercial exploitation of child labor. But it is an entirely different thing to say that we are opposed to *the* child labor amendment which is masquerading under the misnomer of



HON. FRANK J. HOGAN

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Committee Recommendations Read

Chairman Simpson then read the following recommendations of the committee and moved their adoption.

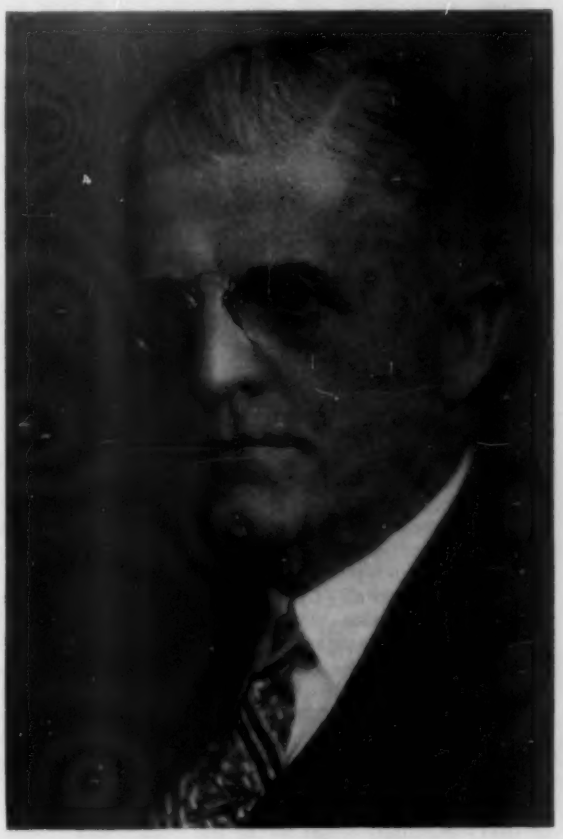
(1) That the Board of Governors be instructed to conduct a referendum vote of the members of the Association, pursuant to Article V, Section 10, of the Constitution of the Association, upon the pending Amendment, upon any proposed substitute Amendment, and upon the proposals to deal with the subject by Federal and State legislation and upon any other related matters upon which the Committee may desire instructions.

(2) That the results of such referendum vote, when taken and announced, shall constitute the instructions to your Committee and shall govern in all respects its actions and recommendations; and

(3) That your Special Committee be continued upon the above-stated basis.

Mr. Isador Lazarus, of New York, opposed the resolution, although he would have no particular objection if it were amended so as to leave out all of it which involved the continuance of the committee. He specially objected to the continuance of a committee with the one-sided label, "To Oppose the Child Labor Amendment."

Mr. Louis S. Cohane, of Michigan, thought it, "very important to make clear at this time, as a matter of decency and selfrespect of the American Bar, definitely and emphatically, what is our position. He said that it is a vile slander upon the lawyers of America and the American Bar Association, to say that the American Bar Association is opposed to a child labor amendment or to legislation which is well calculated and designed to abate and destroy the monstrous menace of the evils of child labor and commercial exploitation of child labor. But it is an entirely different thing to say that we are opposed to *the* child labor amendment which is masquerading under the misnomer of



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a child labor amendment and takes away from the people of America and from the legislatures of forty-eight states the power to regulate the work and labor of grown men and women to the age of eighteen. The misnomer and the masquerade we cannot conceal from ourselves. . .

American Bar Association Not Opposed to a Child Labor Amendment

"I conclude by saying again — and I hope the papers in the United States of America will carry it — that the American Bar Association is not opposed to a Child Labor Amendment. We are for it. We are the first to abhor and decry the evils of child labor and to demand destruction of the commercialized exploitation of child labor. But we want to see proper law, we want to see a proper amendment, and laywers all over the United States and in the legislatures of the States throughout the country today are working on that problem, to give it a sane and sensible solution and not one that is ridiculous almost upon the very face of it."

Chairman Simpson desired to call the attention of Mr. Lazarus to the fact that it was entirely within the power of the Board of Governors to make an appropriate change in the name of the committee.

Mr. Frank J. Hogan, of the District of Columbia, was recognized, and spoke as follows:

"It may be utterly unnecessary to speak even briefly in support of the resolution offered to you by the Chairman of the Child Labor Committee, but I do so lest we fail to grasp the question which that resolution puts before us.

"In 1924, when the now pending—if it still be pending—Child Labor Amendment was adopted by the requisite number of the two houses of Congress, it was not in any sense a proposition of the present National Administration. I do not have to remind you that at that time both houses of the national legislative body in Washington had majorities of a party altogether opposed to the party now in power. In my opinion, that 1924 resolution is already dead, but the position of the American Bar Association has been widely misrepresented on the broader question of limiting and, in appropriate cases, prohibiting the commercial exploitation of young children in industry.

"At the recent session of Congress, Senator Vandenberg offered a resolution for an Amendment to allow the Congress to legislate only in respect to limiting or in proper cases prohibiting the employment of children for hire in industry. Hearings were had before the Judiciary Committee of the Senate, and all factions having any real interest in this subject were heard.

"Religious bodies, employers, those who are socially minded and are in favor of the board regulation of child labor were all heard, and without a dissenting voice the position was taken that the Vandenberg Amendment, if adopted by the people, in the next seven years, would meet all of the objections heretofore made by the American Bar Association or great bodies of our people, including some of the representatives of some of the religious faiths. . . . The Judiciary Committee of the Senate, a body which has been considerably in the public eye since February last, and ten members of which we all honor, unanimously reported to the Senate the Vandenberg Child Labor Amendment with a recommendation that it pass. And, my fellow members, at the next session of Congress the Vanderberg Amendment will be overwhelmingly voted for by the Senate and House and proposed to the people of this country.

Misrepresentation of Association's Attitude

"Our present position—it has been correctly stated by your Committee over and over again—is not opposition to action on the subject of Federal control of questions relating to child labor; it has been an opposition based upon clearly-stated ground to a specific amendment, the 1924 amendment. But it has been the subject of more misrepresentation of the position of this organization than anything else that we have done.

'I hope, my friends, that we will not dodge that sort of an opportunity, and that we will adopt this report and this resolution."

Mr. Mayer C. Goldman, of New York, thought the name of the Committee most unfortunate and offered a resolution to amend Chairman Simpson's motion so as to make the name, "Committee to Study the Question of the Child Labor Amendment." Chairman Simpson suggested that this name seemed to be putting the Committee back further than it was five years ago. However, he had no objection to changing the name to "Committee on the Child Labor Amendment." Mr. Goldman accepted the suggestion. At this point Mr. William L. Ransom pointed out that the name of the Committee was a purely administrative matter, determined by the President and Board of Governors, and that it could readily be changed to conform to the expressed views of the lawyers of the country, when ascertained by the referendum.

Regards Subject as One of Social Legislation

Mr. Guy Richards Crump, of California, desired to express a viewpoint different, he believed, than that expressed by any of the previous speakers.

"This whole subject of child labor has become the Banquo's ghost of the American Bar Association," he said. "It has plagued us from its inception and will continue to plague us so long as we have it before us. I am not speaking either in favor of the Child Labor Amendment or against it. My position is that it is a subject of social legislation on which the American Bar Association is not particularly qualified to speak. We never should have taken it up in the first place, and the sooner we get rid of it, the better.

"The expense of that referendum, if taken among the members alone, will be approximately $5,000, and, taking the entire bar of the country, about $15,000. . . . Personally, I think the thing to do is to lay this whole subject matter on the table. . . . That is a substitute motion."

The question was put and the motion to lay on the table prevailed.

Recommendations of Committee on Supreme Court Proposals Unanimously Approved

Mr. Sylvester C. Smith, Chairman of the Special Committee on the Supreme Court Proposal, next presented its highly important report, which is printed in full in another part of this issue. The report recommended present action by the Association to maintain its continuing preparedness to resist attacks on the independence and integrity of the Courts of the United States. The recommendations elicited hearty applause. At the conclusion of his remarks, Chairman Smith moved the adoption of the following resolutions:

1. That a Special Committee of seven members be created by the Association, to continue the advocacy of the views voted by the membership of the Association in behalf of an independent judiciary;

(*Continued on page* 900)

PROCEEDINGS OF HOUSE OF DELEGATES

First Session of House of Delegates Adopts Amendments to Constitution and By-Laws—Secretary Announces Membership at All-Time High—Subject for Ross Essay Contest Announced—Committee Reports Considered

HOUSE called to order by President Stinchfield; who makes a brief statement and turns the gavel over to Chairman Morris. A businesslike gathering which promptly gets down to business. Every phase of Association's work and the interests of all State Bar organizations brought together "under one big tent." Proposed Amendments to Constitution and By-Laws read and approved. One amendment to Constitution "staggers" the terms of State Delegates, so as to secure greater continuity of service and experience in that body. Another provides for "sustaining memberships," as a means of aiding the Association better to discharge its growing responsibilities to the public and the profession. Secretary Knight announces that membership of Association has reached an all-time high. Applause. Winners of American Citizenship Essay Contest announced; also subject for Ross Essay Contest for 1937-38. Committee on Judicial Selection and Tenure continued. Important and constructive report of Joint Committee on Cooperation between Press, Radio and Bar as to Publicity Interfering with Fair Trial of Judicial and Quasi-Judicial Proceedings approved as to portion agreed on by representatives of the American Bar Association, American Publishers' Association and Society of American Editors. Committee continued to seek further agreement of the three groups.

PRESIDENT STINCHFIELD opened the first session with a brief statement. He said that he would not be with the House throughout the afternoon because it seemed to him that it should carry on its business with its own chairman presiding. The Chairman was infinitely more familiar with it than he was, and it was due to him and those who had worked with him that the business be conducted under his supervision.

Roll call—138 present. Announcement that Mr. Robert F. Maguire, of Oregon, and Mr. Walter Chandler, of Tennessee, had been elected Assembly Delegates in the House to take the places of Hon. John W. Davis, of New York, and Mr. Jefferson P. Chander, of California, who had failed to register. Statement by Mr. George Maurice Morris, of Washington, D. C., Chairman of the House, with respect to the program. The Arrangement Committee, in accordance ith the authority conferred by the Rules of the House, had put certain committee reports, thought to be of general interest to members, on the program of the Assembly. Committee chairmen, however, he warned, should remember that these reports were also on the program of the House and they should report to it also.

At this point President Stinchfield retired from the chair and Chairman Morris took the gavel. The Committee on Rules and Calendar thereupon presented its report, through Mr. Guy Richards Crump, of California, in the absence of Chairman Sylvester C. Smith, Jr., who was unavoidably absent from that session. At this time the Committee desired to present only that portion of its report which had to do with the three proposed amendments to the Constitution and By-laws of the Association.

Proposed Amendments All Adopted

The first proposed "staggered" terms for members of the House of Delegates. The Assembly had approved it and the Committee did also. The second proposed that the name of the Judicial Section be changed to the "Section of Judicial Administration." The Assembly had also approved that and the Committee took the same view. The third, an amendment to the By-laws, proposed the creation of a special class of members to be known as contributing or sustaining members, who would pay dues not to exceed $25 a year in addition to or in lieu of the usual dues, but who should have no rights or privileges beyond those of other members.

The first two proposed amendments were adopted unanimously. A motion was made to adopt the third. There was some discussion. Judge Harrison A. Bronson, of North Dakota, had no objection to the amendment, but he questioned the propriety of the Board of Governors, an agency of the House, sending an amendment to the Assembly for its approval before the House itself had had a chance to consider it. He thought that any approval of the amendment by the House should not be regarded as establishing a precedent for the course the Board of Governors had pursued. On vote, the amendment was adopted.

Report of Secretary and Treasurer

Secretary Knight read his report, which was approved. The past year had been one of unusual activity for the Secretary and the Headquarters staff. The increasing routine business of the office had been attended to—and the amount of this was suggested by the fact that, with the extra mailings of the JOURNAL and the membership campaigns during the past year, there had been an average daily outgo of mail from Headquarters of 3300 pieces. Under the head of Membership the report stated that 3177 applications for membership had been received during the fiscal year ending June 30, 1937, and since then 1080 additional applications had been received. The total net membership as of September 23 was 29,706—which was the highest on record, with the exception of 1932, when it reached 29,795. With favorable action on approximately 600 applications pending, present membership reaches an all-time high.

Treasurer Voorhees presented to the House the annual report of the Treasurer. As heretofore the books

of the Association had been audited and certified to by an independent accounting firm; and the Treasurer distributed printed summaries from that statement. The Treasurer distributed also to the members of the House a detailed statement showing the Association's expenditures in connection with the public discussion of the Court issues, from February, 1937, to date. The outlays in obtaining the instructions of members of the Association upon the Court proposals (first referendum) amounted to $4,135.08. The expenses in obtaining the opinions of non-member lawyers upon the same issues (second referendum—142,000 ballots sent out) amounted to $17,045.48. The expenditures of the Association in supporting the position voted by a large majority of its membership totalled $35,901.63. The reports by the Treasurer were received and approved.

Chairman Rix of the Ways and Means Committee stated that voluntary contributions by members of the Association are being received, to reimburse the treasury of the Association for the full amount of the outlays in connection with the Court issues, so that the same will not be at the expense of the Association's resources or regular work and will not be directly or indirectly borne by members who voted minority views. As of October 27, the amounts received by the Ways and Means Committee from members of the Association, for this reimbursement, were stated by Chairman Rix to amount to $54,900.42, and that payment of voluntary subscriptions covering the remaining amount is expected within a few days.

Secretary Knight reported for the Board of Governors. It had accepted the report of the Special Committee to examine essays submitted in the American Citizenship Essay Contest and, in accordance with its findings, had awarded a first prize of $400 to Harvin D. Mulkey, of the South Georgia Teachers' College, Collegeboro, Ga.; second price, $300, to Esther Lencher, Pittsburgh, Pa.; third prize, $200, to Margery Corey Maddock, Waterloo, Iowa; fourth prize, $100, to Lester P. Voigt, Eau Clare, Wis. The Board recommended to the House that, for financial reasons, a mid-winter meeting be not held during the fiscal year. Motion to approve the report unanimously carried.

Reports of Committees on American Citizenship and on State Legislation, containing no recommendations, received and filed. Report of Committee on Legal Aid, transmitted by the Board of Governors without comment (except as to that portion of it dealing with compulsory public defenders, which the Board disapproved) also received and filed.

Committee Reports Presented

John W. Guider, Chairman of the Committee on Communications, presented its report. There were two resolutions: the first being the usual one authorizing the committee to confer with any committee of the House or Senate or with the Federal Communications Commission, and to make available to them such information, conclusions and recommendations as to matters within its special field as may be agreed upon, after prior approval by the Board of Governors; and the second, authorizing the Committee, through a delegation of one or more of its members, to represent the Association at international congresses and conferences in its field, in the role of observer and without expense to the Association. Both recommendations were adopted.

Report of the Committee on Judicial Salaries received and filed, as it contained no recommendations. By unanimous consent, the Chairman, Mr. Walter S. Foster, of Michigan, supplemented the report with a brief statement on the subject. During the past few years judicial salaries had been reduced by law in fifteen States and by voluntary action of the judges in nineteen others. Now, however, the tide has turned and during the past year, four States had increased salaries of the judges of the Supreme Court and seven had increased salaries of nisi prius judges. Moreover, pensions had been provided in several States. The Committee had had difficulty in getting up-to-date reports and he asked members to compare the figures in the printed report and inform him if they were correct as to their States.

Committee on Judicial Selection and Tenure Continued

Report of the Committee on Judicial Selection and Tenure was transmitted to the House by the Board of Governors with the recommendation that the committee be continued. Recommendation approved. Certain corrections in the report, volunteered by various members, were accepted by Chairman John Perry Wood. Report of the Committee on Facilities of the Law Library of Congress presented by Congressman Walter Chandler, of Tennessee, a member of the Committee. It contained three resolutions. The first commends Congress for its increased interest in and support of the Library, urges Congress to pass H. J. 19, providing that the income from the Holmes bequest be set aside as a special fund, for the purposes indicated, and urges the Association members to assist the library, wherever possible, by gifts of books and legal manuscripts and also of funds to provide for the purchase of rare books and source material and for the purpose of establishing Special Chairs and Consultantships in Law. The second resolution continues the committee, and the third authorizes it to continue its cooperation with the appropriate governmental agencies to further the development of the Library. All were adopted.

Report of the Committee to Further the Acquisition of Portraits of Former Associate Justices of the Supreme Court, Henry Upson Sims, Chairman, was approved in accordance with the recommendation of the Board of Governors.

Cooperation between Press, Radio and Bar

Report of the Committee on Cooperation between the Press, Radio and Bar as to Publicity Interfering with Fair Trial of Judicial and Quasi-Judicial Proceedings, showed progress. Chairman Newton D. Baker was unavoidably absent, and the report was presented, and statements made, by Judge Oscar Hallam, of Minnesota, and Mr. Giles J. Patterson, of Florida. The report had been printed in the Advance Program, sent to all members. The Committee was composed of representatives of the Bar, the Newspaper Publishers Association, and the American Society of Newspaper Editors. The tri-partite Committee was not in entire agreement on the subject of the use of cameras or photographic appliances in the courtroom or the use of sound registering devices for publicity purposes in the courtroom. The newspaper publishers had not accepted this phase of the recommendations. In accordance with a suggestion from Chairman Baker, a resolution was presented that the report be approved in so far as it had been approved by the three groups, and that it be continued for the purpose of obtaining, if possible, further agreement of the groups.

Mr. John Kirkland Clark, of New York, offered an amendment to the effect that the part of the report as to which no agreement had been reached be referred to the Council of the Section of Criminal Law for consideration and report. Mr. Arthur T. Vanderbilt expressed the view that the matter should be left to the exclusive jurisdiction of the present committee. Mr. W. L. Ransom, of New York, felt that this was due to the distinguished committee of publishers, editors, and lawyers who had worked together with such gratifying results. Mr. Giles J. Patterson, of the Committee, said he was sure the Committee had no objection to the Section of Criminal Law making such study as it desires, but he did not think it should be hampered by having the matter officially referred to the Section. The proposed amendment was thereupon voted down and the original motion prevailed.

Second Session of House of Delegates—Action of Assembly on Report of Committee on Supreme Court Proposals Unanimously Approved—Committee Reports Considered and Acted On—Child Labor Amendment Report Made Special Order

WITHOUT a dissenting voice House concurs in action of Assembly and approves all recommendations of the Special Committee on the Supreme Court Proposals. Sessions of the House prove impressive and most interesting to general attendance at convention. Teamwork and understanding between Sections, Committees, and Delegates develop. Members balk at following old precedent of recommending, without examination, Uniform State Laws prepared and presented by Commissioners, and action is postponed. Report of Committee on Administrative Law causes prolonged debate. House adopts several rec-

ommendations of Committee and approves its major recommendation in principle but votes that the contents of any bill shall be subject to the approval of the Board of Governors. House shows approval and appreciation of pioneering work of Committee but is not ready to "sign on the dotted line" as to form of legislation. Report of new Committee on Economic Condition of the Bar arouses particular interest. Preparation and publication of manual describing methods of surveys already made approved as a means of stimulating further investigation along these lines. Recommendation of Committee on Federal Taxation, that persons be permitted to dissolve personal holding companies without incurring heavy income tax liability on such dissolution, referred to Board of Governors for consideration on broader lines than tax aspects.

CHAIRMAN MORRIS called the House to order. Secretary Knight reported the action taken by the Assembly that morning, which had been duly certified to the House.

The Assembly had elected unanimously the following members of that body Delegates to the House of Delegates for the year beginning at the end of the Kansas City meeting: William L. Ransom, New York City; A. B. Lovett, Savannah, Ga.; J. Weston Allen, Boston, Rhodes, Kansas City, Mo. It had voted to table the Report of the Special Committee to Oppose Ratification by States of Federal Child Labor Amendment and Promote Adoption of Uniform Child Labor Act, without further action. It had approved the four recommendations of the Special Committee on the Supreme Court Proposals. It had approved the resolutions in the report of the Standing Committee on Jurisprudence and Law Reform, with certain amendments of resolutions one and five.

Child Labor Amendment Made Special Order

The House thereupon adopted the action of the Assembly on the report of the Supreme Court Committee; on motion of Mr. Vanderbilt, of New Jersey, made the report of the Committee on the Child Labor Amendment special order of business for the meeting on the afternoon of the following day; and adopted the action of the Assembly on the report of the Committee on Jurisprudence and Law Reform.

Col. John H. Wigmore, President of the Conference of Commissioners on Uniform State Laws, presented the report of that body. He gave some details as to the recent meeting of the Conference, and moved that the four Acts which had been approved by it be approved by the Association and recommended to the States and Territories for adoption. The Acts were: the Uniform Criminal Statistics Act, the Uniform Expert Testimony Act, the Uniform Trusts Act, and the Amendment to the Uniform Trustees' Accounting Act.

Mr. Walter S. Ruff, of Ohio, inquired how the House could vote intelligently on these Acts without having examined them. Mr. Frank W. Grinnell thought the matter should be put over until Friday, so that members could have an opportunity to read them, and made a motion to that effect. Chairman Wigmore stated that from the beginning the Association's approval of the Acts proposed by the Conference had been more or less formal, on faith in the work of the Conference. He pointed out that all of them had been the subject of debate in the Conference for three or four years, and that it was obviously impossible for the House to give them detailed consideration.

Mr. William L. Ransom, of New York, did not think the House should make a precedent of putting its stamp of Association approval on any document which was not at least before it. This might seem a formal and technical objection, but it seemed to him important as a matter of precedent. On a vote, Mr. Grinnell's motion to postpone approval until the proposed Acts were before the House was adopted.

Report of Committee on Administrative Law

Report of the Committee on Administrative Law, Col. O. R. McGuire, of Virginia, Chairman. Col. McGuire presented the recommendations. The first, for the continuance of the committee, was unanimously adopted. The second, he stated, was almost identical in language with that adopted at Boston, and was directed against the appearance before government departments, bureaus and corporations, with or without compensation, of men in public life holding official positions, and of members of Congress, officials or employees of the departments, offices of national and state political parties, etc., in behalf of any person in relation to any proceeding in which the United States is a party or is directly or indirectly interested. The criminal code, he added, now prohibits the appearance of these men, with the exception of officers of national and state political parties, for money compensation, but the purpose of the measure is to extend it to all cases whatsoever.

Chairman Morris called attention to the fact that the report had been transmitted to the House by the Board of Governors without comment. Mr. William R. Vallance, of the District of Columbia, objected to the breadth of the language of S.B.213, 74th Congress, which the resolution would approve. It would even prohibit the giving of a letter of introduction by an officer in one department to another. Mr. L. Ward Bannister, of Colorado, was absolutely opposed to the resolution. It was all right to forbid Congressmen to appear before Departments and Commissions for compensation, but it was all wrong to say that they should not do this even though they received no compensation. There are cities, Chambers of Commerce and individuals who undoubtedly have legitimate requests to make of their Senators and Representatives for assistance with departments and agencies of the Federal Government. Mr. Bert M. Kent, of Ohio, also opposed the resolution. Sometimes for instance, a man has an application pending in the Patent Office and the Examiner who handles the case feels he can help the applicant by a suggestion as to how his claim should be worded. That would be a criminal act under the proposed measure. He moved that this recommendation be recommitted to the committee.

Chairman McGuire here stated that this was a matter which had been twice approved by the Association. The House's action would depend somewhat on its conception of the functions and duties of the men elected to make the laws, officers of the departments and the others mentioned. If the members thought the elected representatives of the public should interfere with the administrative departments, that was of course their privilege. If the House wished to reverse itself as to the action heretofore taken, it was all right with the committee.

House Recommits Committee Recommendation

Mr. D. A. Simmons, of Texas, said that it had always been the custom, so far as he knew, for the Senators and members of Congress to help present matters to the War Department on behalf of their States, ports and communities. It had been a main function of Congressmen from his city (Houston) for many years to assist at Washington in the great public projects of the State and communities. The proposed measure would make all this useful service a criminal offense. At the conclusion of his remarks, Chairman Morris put the question on the motion to recommit, and it was adopted.

Chairman McGuire then moved the adoption of the third recommendation in the Report, which was that selective civil service be extended to all lawyers in the service of the United States below the grades of cabinet officers and assistant secretaries of departments, including members of commissions and boards who are engaged in quasi-judicial work and who are not engaged in policy-making positions. He made a brief explanation of the reasons for the resolution, at the conclusion of which it was adopted. He then presented the fourth resolution, by which the Association would urge the establishment of a clinic in Washington, to be attended each year for at least a week by teachers of administrative law and others. He explained the advantages which such a clinic would offer and the beneficial results which should be obtained from it. Mr. Slaton, of Georgia, did not think the clinic suggested would prove useful and moved that that portion of the report be referred back to the committee. Mr. W. L. Ransom thought the clinic sponsored by the resolution was a rather vague, academic thing. It didn't define who was to pay for the clinic, or who was to lead it. He thought the Association would make a serious mistake if it fell into the habit of urging upon unidentified persons the erection of unidentified institutions to be operated and controlled by unidentified persons. He seconded the motion to refer the matter back to the committee. The question was put and the motion to refer prevailed.

Resolution V of the Report then came before the House. Mr. Frank J. Hogan, of Washington, called attention to the importance of the subject and asked unanimous consent that a member of the committee, not a member of the House, be permitted to aid the Chairman in presenting it. Mr. Guy R. Crump of California, supported Mr. Hogan's request but felt that it should not be taken as a precedent for the hearing of non-members by the House. This was the second occasion where request had been made for unanimous consent to hear a non-member. Chairman Morris inquired how many members of the Committee, besides the Chairman, were members of the House. Mr. McGuire stated that two others were members. Objection was made by one or more members to granting the request, preventing the unanimous consent necessary for a non-member to address the House.

Terms of Proposed Measure Explained

Chairman McGuire thereupon explained that the resolution was one approving "in principle, a bill to be enacted into law during the 75th Congress, 2nd Session, if possible, to provide for the more expeditious settlement of disputes with the United States, provided, that the final form of the bill shall be approved by the Board of Governors before being introduced in Congress and shall have the requirements set forth in full in the Committee's recommendations as set out in the Advance Program. Chairman McGuire explained the object of the resolution. It provided, first, that the various heads of Departments, Commissions, Boards, etc., should issue rules and regulations complementing both the adjective and substantive terms of the statutes they are required to administer. The purpose of this was to enable the citizen and his attorney to find out in advance of litigation or action what the administrative officers of the particular agency understand the law to be. This cannot be done at present as the officers in question have no statutory authority to give such information. And as disagreement will often arise between the government official and the business man and his lawyer as to the validity of particular regulations, the draft of the proposed bill provides that such regulations may be taken to the Court of Claims by petition to determine their legality. This will enable the citizen to test out the regulation when first issued. In view of the expressed attitude of the Customs Bar and the Tax Bar, these two agencies have been removed entirely from these and certain other provisions. In leaving this phase of the subject, Chairman McGuire called attention particularly to the provision that there must be a public notice and opportunity for hearing before the regulations are issued.

The second phase of the matter, the Chairman continued, dealt with the determination of disputed cases between the government and the citizen. It had been urged that these cases be taken into District Courts or tried before independent boards, with appeal in the regular judicial procedure. The Committee had not adopted either of those suggestions but had proposed a third method which recognizes the existing system. In most of the departments, as shown by a manuscript prepared by a research man for the Brookings Institution, there is "a board passing upon many of your controversies with the United States. Now these men are handicapped in handling these cases because they have no authority to summon witnesses, they cannot permit examination and cross examination of witnesses, they cannot subpoena documents, and they may be overruled by a superior authority. You cannot take all of the cases to the district courts . . . You remember what happened under the prohibition cases. They attempted to take all of those district cases to the district court and almost swamped them. . . .

"We propose in this draft, in recognition of this system which is existing, to provide that there shall be a board of three men, one of whom is a lawyer, must be a lawyer—all of them may be, but in certain technical questions, engineering, and things of that sort, it is very well to have expert assistance, and that is what they have now, with no lawyer, in many instances, on the board. We think one lawyer can keep the record straight and guide the other two so far as the legal questions are concerned.

"These men will sit and hear the case. You will be permitted to present your evidence just as you would in court, you will examine these drafts through, you will examine the witnesses, cross-examine them, subpoena documents, and build your record carefully as you would in a trial court. Then this board will make up its findings and its conclusions, somewhat as the Court of Claims does now, or a court without a jury.

"We intend by this draft, and it is so provided, that wherever practicable, these boards shall be organized throughout the United States. That is, to provide,

if possible, to have the board organized in your locality where you can handle your case before the board there without having to come to Washington. If the board's decision is made and is not satisfactory, you can take the case on that record with those findings of fact and conclusions to the Circuit Court of Appeals. You do not have to follow that procedure unless you want to; this is an alternate procedure. You can go and negotiate with the government officials in Washington and see if you can settle the case amicably if you want to; you must specifically demand the board, and it is the election of his attorney and his client as to whether he will go before the board or try to exhaust his present remedies and then sue if he can sue. . . .

The committee chairman proceeded with further explanations of the resolution, and then moved its adoption. Chairman Morris suggested that it might be wise for the House to consider the provisions of the proposed bill before approving the measure in principle, as set out in the first paragraph.

Resolution Opposed on Various Grounds

Mr. John M. Slaton, of Georgia, spoke in opposition to the resolution. He was opposed to bureaucratic government and the committee was proposing to set up a system whereby each department would create, under the head of the department, a board of three members to hear controversies between citizens and that department; and the members of such boards would hold office at the absolute pleasure of the department head. Moreover, the board's decisions would be reviewable by him. Again, any review of its decisions would be limited to questions of law if there was any evidence to support the board's further findings. If he were allowed to decide the facts in the case, there wouldn't be much question as to the applicable law. The proposed system lacked the fundamental safeguards which any system, even partly judicial in substance or form, should always have.

Mr. Monte Appel, of Minnesota, a member of the committee, presented what was, in substance, a minority report in opposition to the proposal. He reviewed and criticized the main provisions of the bill. He believed the plan reduced judicial independence to the sub-zero point and that it was unsound in principle. He thought it might be a source of serious embarrassment to the American Bar Association, particularly at this time, to be the active sponsor of the bill. The time is not now propitious for securing an impartial and dispossionate hearing on any matter connected with the Federal Administration of Justice. It seemed to him wiser to recommit the matter, as Governor Slaton had moved, to the committee for further study and report.

Mr. Julius C. Smith, of North Carolina, also a member of the Committee, opposed the motion to refer. The committee had given the matter careful study, and had presented the best proposal that seemed practicable. The committee did not contend the measure was perfect, but the situation was serious and it was imperative that a start be made. A constructive outcome of the debate appeared probable when Mr. Walter S. Fenton, of Vermont, pointed out that there were recommendations made in Resolution V of the report as to which no controversy could arise. It would be a shame to lose the benefit of all that was contained in the first two subdivisions. He moved by way of amendment that the resolution be separated into its constituent parts as numbered, and if this was voted, he proposed to follow with a motion that the matter in the first two sections be adopted. On vote the motion to separate was adopted, whereupon Mr. Fenton moved the adoption of the first two divisions of the resolution. There was some discussion—initiated by Mr. Morrison R. Waite, of Ohio—as to the meaning of the provisions giving immunity for a period of 30 days to anyone who acts in good faith in conformity with a rule or regulation officially promulgated. Mr. William R. Vallance, of the District of Columbia, pointed out the tremendous labor that would be involved if the heads of all departments and the government agencies were required to issue regulations implementing the statutes they were required to administer. Chairman McGuire replied that if the matter were made discretionary it was doubtful whether the regulations would be issued. After further discussion, aimed at assuring that the adoption of the first two provisions would not involve the custom laws service and administration and the revenue law service and administration, and that patent matters were entirely out of the draft, the question was put and Mr. Fenton's motion prevailed.

Bill Made Subject to Approval of Board of Governors

The question before the house was then the original motion of Governor Slaton, of Georgia, that those portions of the resolution not covered by the action of the House just taken be recommitted for further consideration. Chairman McGuire closed the debate to the motion to recommit. On vote, the motion was lost. Mr. William L. Ransom thereupon moved that the remaining sections C, D and E be approved as a declaration of principle and that the contents of the bill be subject to the approval of the Board of Governors. Mr. Thomas B. Gay, of Virginia, pointed out that the latter part of this motion was already provided for in the committee's own recommendation. Chairman McGuire stated that it had always been the policy of the committee to let the Board of Governors and, so far as possible, the House of Delegates, know every thing that it was doing. The motion was satisfactory to him. Mr. Martin Caraballo, of Florida, moved an amendment that the House was opposed to the parts of the resolution which suggest or approve of the principle of the appointment by the head of a department of a board of review consisting of his subordinates in the department. Mr. Hogan, of the District of Columbia, opposed the amendment. If an effort was made to set up reviewing boards apart from the department, it would get nowhere; Congress would not authorize them and the expense would be prohibitive. We must not assume that we would not get perfectly fair, decent and honest treatment from our government employees. We should not assume that the courts are going to uphold findings when they are not supported by substantial evidence. The amendment was put to a vote and defeated, after which Mr. Ransom's motion was passed.

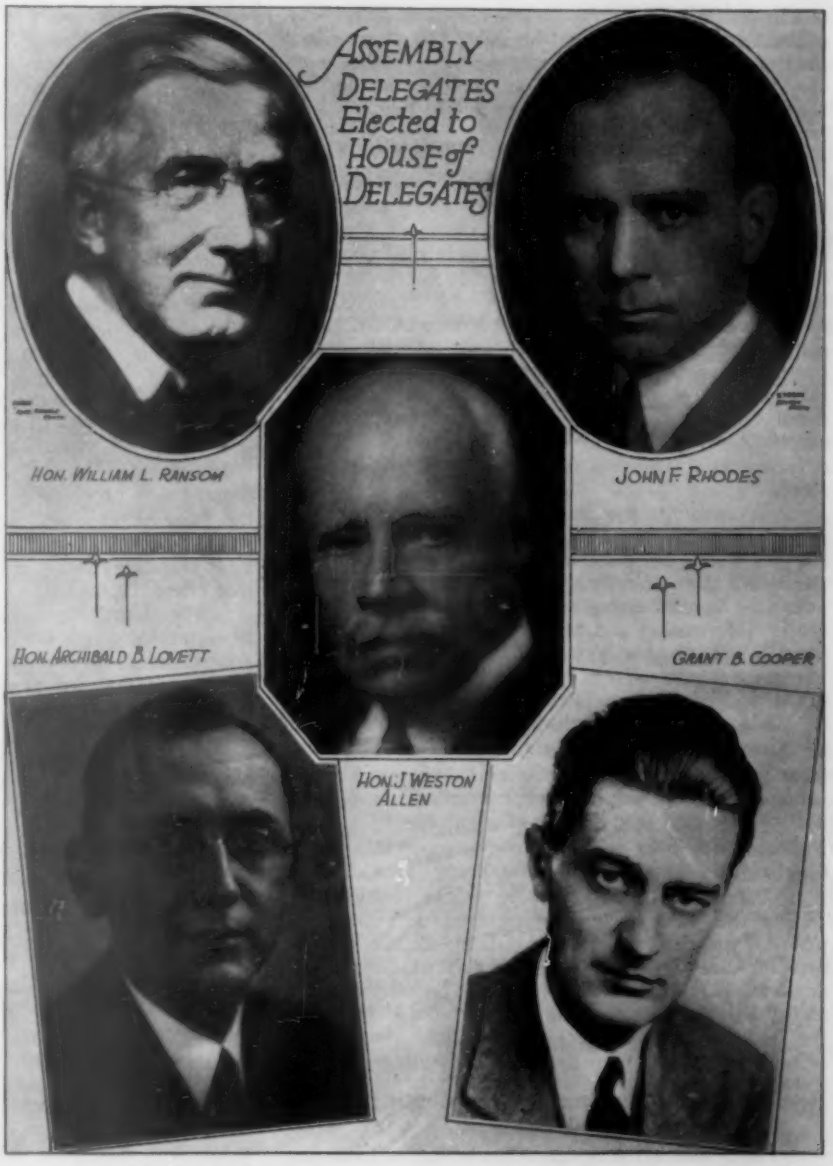
The report of the Committee on Customs Law was presented by Chairman Albert MacC. Barnes, of New York. The committee requested that it be authorized to bring before the Board of Governors any grounds of opposition to H. R. 8099, having to do with customs administration, and that the committee be continued. Passed.

Committee on Economic Condition of Bar Reports

A highly significant report was next presented by the Committee on Economic Condition of the Bar, of which Mr. Lloyd K. Garrison, of Wisconsin, is chair-

man. This is a new committee, created by action of the House of Delegates last winter. The report dealt largely with the various surveys of the economic conditions of the Bar which have been made in various states — generally by bar associations and under their direction. These surveys, Chairman Garrison stated, had in the main sought to ascertain as accurately as possible, what the incomes of lawyers were in relation to their locations, their types of practice, their age and length of service at the Bar, and their legal and prelegal education. Some of them had also sought to measure statistically the growth or decrease of legal business in various communities, correlated with the growth of the Bar and of the population and, finally, some sought to ascertain the extent to which legal business exists which is not now performed by lawyers at all.

"Our Committee," the Chairman continued, "studied very carefully all of these surveys that have been undertaken to date. After studying them, we felt them to be of very great value and importance, and felt it to be our duty to recommend ways and means of stimulating further surveys in the different states along these pioneer lines.



Need of Statistical Information to Solve Bar's Problems

"It goes without saying, and to me it takes no argument to point out, that without this kind of factual, statistical information about the actual conditions in the practice of law, we cannot with complete intelligence approach the problem of admission to the bar. For example, without knowing what lawyers are making, what the problems of overcrowding are, and so on, the whole problem of admissions becomes difficult to get at. The question of giving to men who think they want to study law and become lawyers some actual concrete facts about the profession in order that they can know whether they really want to engage in it or not—that is impossible without factual information of this sort.

"These surveys have shown that many young law students enter the study of the practice of law with an altogether false notion of the riches which they are going to make when they get out, and so on. Nor, without more accurate information, can we go in intelligently for placement bureau work under bar association or law school auspices, to steer young men admitted into the practice to those spots that really need them, and to discourage them from going to those spots that are obviously overcrowded. All of this information will help us to inaugurate such placement bureaus, and without that information any such work is almost out of the question.

"Finally, with information of this sort at hand, we can study seriously the question which has been raised by the New York County Lawyers Committee report, and a few others, of whether or not it might be worthwhile to set up a new kind of law office under bar association control and supervision, designed to render legal service on a very low-cost basis to that portion

of the public which now does not consult lawyers at all, and which, if they could be steered to a specialized kind of service within their means and reputably managed, might avail themselves of such service for the benefit not only of the profession but of themselves.

Plan to Stimulate Further Investigations

"It seemed to us the only way we could stimulate the making of further investigations along these lines in the different states would be to prepare a manual describing in detail the surveys already made, and describing in detail the methods used to carry out those surveys—the questionnaires that were employed, the forms that were used, the way the different bar association groups and other groups went about making these surveys, the staff that it takes, the length of time, the cost, all of those bread-and-butter, housekeeping details which you want to know in your own bar association if perchance you are interested in making a factual study of the conditions of the bar in your state.

"We wrote to the presidents of the bar association of every state in the Union as to whether their associations would be interested in receiving a manual of the sort I have described, and whether they would be interested in conducting surveys if given that kind of special information and help. The overwhelming majority of the replies expressed a great eagerness to have such a manual, and expressed a very real interest in the possibility of conducting surveys of the economic condition of the bar in their localities. So our first recommendation, the adoption of which I now move, is:

"That the plan for preparing, publishing and distributing a manual of the sort hereinafter described be approved."

Mr. Blaine Hallock, of Oregon, inquired if the chairman was in a position to give some idea of the approximate outlay which the publication and distribution of the manual might involve. Chairman Garrison replied that they were now engaged in putting the material together and it was difficult at this time to give the size of the manual or its cost. However, any approval of the plan would of course be subject to the ability of the Budget committee to provide funds for the undertaking. The committee would simply have to take its chances with the other committees.

Resolution for Preparing and Distributing Manual Adopted

The resolution was carried, whereupon Chairman Garrison moved the adoption of the second recommendation, that when the manuals have been distributed, each State Bar Association and the principal local and Junior Bar Associations, should be asked to appoint special committees to report on the feasibility of conducting state or local surveys, and to make recommendations in accordance with the facts disclosed by such surveys, with special reference to admission standards, educational standards, the establishment of legal clinics and other enumerated related matters. The motion to adopt prevailed, and the chairman presented the third recommendation—that continued cooperation with the Department of Commerce in securing nation-wide statistical information as to the profession be maintained, and that the Association should urge its members and the Bar generally to respond to any further questionnaires which the Association may participate in drafting.

On motion, the resolution was adopted, and a further one that the committee be continued.

Committee on Federal Taxation Reports

Chairman Robert N. Miller, of the District of Columbia, presented the report of the Committee on Federal Taxation. So much had happened since its report had been written that it had been necessary to file a supplemental report. He presented the first resolution, which directed that the committee continue to act under the mandates of the Association at this and previous meetings. Adopted. He presented the second recommendation—that the committee be authorized, in connection with income tax legislation, to advocate the principle of adhering as closely as possible to the concept of net income which has been developed by settled business practice. This was adopted. He presented the third recommendation, "That the American Bar Association recommends to the Congress that Section 77B of the Bankruptcy Act be amended by adding a new subsection (q) in order to preclude the treatment of modification, alteration, cancellation or forgiveness of indebtedness as income to the debtor corporation in reorganization proceedings brought under Section 77B of the Bankruptcy Act," and that the committee be directed to cooperate with the Committee on Commercial Law and Bankruptcy in submitting an amendment to that effect. Adopted.

The fourth recommendation opposed any legislation under which the Board of Tax Appeals or any governmental agency charged with reviewing the correctness of Treasury tax determinations would be combined or associated with agencies charged with reviewing determinations by administrative authorities concerned with regulatory laws. It was adopted without discussion, as was also the fifth resolution recommending amendment of Section 276(b) of the Revenue Act of 1936 so as to make clear that the consent provisions extend to cases involving transferees.

Recommendation as to Personal Holding Company Provisions of 1937 Revenue Act

The recommendations in the Supplemental Report of the Committee were then taken up. The first dealt with the personal holding company provisions of the Revenue Act of 1937. The definition of personal holding companies had been very much broadened and the rates had been tremendously increased. In looking over the field it was clear that a great many personal holding companies now coming within the range of the technical definition never had anything to do with taxation in their inception and there were many others which for various reasons would find it impossible to declare out the required dividends. It seemed to be the purpose of the government, in passing these severe amendments to the holding company provisions, to cause people to dissolve these companies. If so, that purpose would be well served if people could dissolve their personal holding companies without being subjected to a heavy income tax on dissolution. Since so many of these were perfectly lawful when set up and had no tax purpose at all, such an amendment would be entirely fair. The committee made a recommendation to that effect.

Mr. Sylvester C. Smith, of New Jersey, thought that the House should not act on this important matter at this time. The recommendation had been in the hands of members during not more than a few days. He moved that the matter be referred to the Board of Governors with power to take action. Carried. Thereupon Chairman Miller presented another resolution favoring repeal of "that part of Section 201 of the Revenue Act

of 1937 which adds Section 340 to the Revenue Act of 1936, and in default of repeal that it be amended so that no member of the Bar shall be requested to make any returns thereunder," and that the Committee on Federal Taxation be directed to urge such action on the proper committees of the congress. He gave some explanation of the reasons for the recommendation, at the conclusion of which William L. Ransom, of New York, expressed the opinion that this was an important public matter which should be examined from a broader point of view than as a tax question. He moved that it be referred to the Board of Governors. Carried.

Chairman Miller then presented the committee's last recommendation, which expressed the sense of the Association to the effect that the taxation field is one in which the legislative processes should be orderly and unhurried, that hastily enacted tax legislation is reasonably sure to contain defects of substance and expression, and, in effect, that time should be allowed between the introduction of a tax bill and a vote thereon sufficient to permit members of Congress and the public generally to inform themselves as to its provisions and their probable consequences. Carried.

On motion of Mr. Beardsley of California, the House approved the By-laws of the Section on Bar Organization Activities. The House thereupon adjourned.

Third Session of House of Delegates—Address by President of Medical Association—Recommendations of Committee on Child Labor Amendment Approved and Referendum Ordered—Special Committee on Law Lists—Other Committee Reports

ANOTHER big, dramatic session of the House. It is soon standing room only for non-members. The report of the Special Committee on the Child Labor Amendment is the special order. Speakers refute unfounded statements that have been made as to the Association's attitude on this important question. Division of opinion is principally as to whether the House should act here and now or submit the question to a referendum. Special Committee's report proposes referendum, and President-Elect Vanderbilt offers resolution approving and adopting committee's recommendations and directing the Board of Governors to conduct a referendum on matters specified in report of committee. Debate is on high level of earnestness and humanitarian concern. Sentiment favorable to Vandenberg Resolution for Constitutional Amendment indicated by many members. House adopts by vote of 112 to 15 resolution declaring that "the American Bar Association is not now and never has been opposed to an appropriate amendment or appropriate legislation limiting or prohibiting the employment of children for hire," and directing that a referendum be held on the pending Amendment, the Vandenberg Resolution, and other related matters.

Another important subject considered and acted on—Law Lists. This has been a controverted and troublesome issue for many years—now put on the road to constructive remedy. Report of committee recommending creation of Special Committee to investigate and approve such lists, and perform other duties, and establishing standards to which lists which desire approval must conform, is adopted. Members feel that a real start has been made—that a most difficult problem is well on its way to solution. House gives further evidence, in connection with report of Committee on Commerce and report of Section of Criminal Law, of caution in making commitments. Votes to sponsor and encourage nation-wide program of post-admission legal education for benefit of profession. Reports of Sections and Committees carefully considered.

CHAIRMAN MORRIS called the House to order. Roll call. The chairman then spoke as follows: "To no group of men outside of our own profession is this House of Delegates so indebted as it is to the American Medical Association. Many of the ideas used in the formation of this House have been taken from that Association. Today we are highly privileged to have with us in the city of Kansas City, scheduled to speak to one of our groups tomorrow but unable to do so, the President of the American Medical Association. He is Dr. John H. J. Upham, dean of the College of Medicine of Ohio State University, member of the Ohio State Medical Board, and President of the American Medical Association. The Chair asks unanimous consent to introduce Dr. Upham and have him speak to us. The Chair hears no objection."

President of American Medical Association Speaks

Dr. Upham addressed the Delegates as follows:

"Mr. Chairman, Members of the House of Delegates of the American Bar Association, and Guests: It gives me more than usual pleasure to appear before a group of lawyers today because I do not have that feeling of personal trepidation that I usually have when I appear before lawyers, because that has usually been in the witness chair as a medical witness. In fact, our personal relationships between doctors and lawyers are not always under the most happy circumstances. We get you in the sick room but you get us in the court—to speak in the vernacular—and how!

"However, our official organizations have always, I think, worked together in harmony, as indeed they should, because after all we have fundamentally the same objectives. The medical profession is pledged, and its reason for existence is, to study the prevention of disease, to raise the standard of medical education, to elevate the plane of medical practice, and by research to study into the causes of disease and the best methods of treating those cases in which prevention has failed.

"For the past forty years, I feel I may say without fear of contradiction, medical progress has been greater than in any other period of the world's history.

We hear a good deal about the increase of medical costs. It is true that modern medicine costs more, but it is worth more than ever before. It may be a coincidence, but in that same period of time the medical organization in this country has also come to a period of development that has never been equaled in previous history.

"Based on a democratic form of government, with representation from the county society, with delegates to the State organization, and from thence to the national body, the American Medical Association has gathered together the best minds of men representing all types of medical practice, with all types of experience and inspired by the best interests of that profession for the good of the public.

A Good Precedent Followed

"The American Bar Association, following its usual practice, has recognized a good precedent and therefore has established a somewhat similar form of organization, and as I have heard some of your discussions in your meetings today, I feel that you can already see the results of this effective, much more effective type of organization in carrying out those projects and objectives to which you are also pledged.

"As I read in the preamble to your Constitution, you are pledged to the advancement of the science of jurisprudence, you are interested in the advancement of legal education, in elevating the plane of practice—all for the good of the public, for the protection of the legal rights and constitutional privileges of the individual.

"I have noted today also one other thing in which you are cooperating with us, possibly unconsciously, but that you are really entering into the field of preventive medicine, with your commission to study uniform divorce and marrage laws, and many of those plans embracing a pre-marital examination. You are already working with us for the prevention of disease and the production of a better race in this country.

"It is therefore with a great feeling of personal happiness and a sense that it is a great honor and a privilege that I bring to you officially the greetings of the American Medical Association and express to you the hope that these two greatest organizations representing the learned professions may work together for the betterment of the health and the good of our citizens, for making them more contented, therefore happier, and for a greater and better country."

Chairman Morris stated that he was confident he expressed the unanimous opinion of the House in thanking President Upham for coming and bringing the salutations of his Association and asking him in return to carry a message of our good will, our best wishes and ardent hopes for long and successful cooperation in the future.

The special order of business was consideration of the action of the Assembly on the Child Labor question, but unless there was objection, the chairman said, the committee reports that were left over from the previous session would be disposed of.

Committee on Duplication of Legal Publications

The first report was that of the Committee on Commercial Law and Bankruptcy and as it contained no recommendations for action, it was simply received and filed. The next report presented was that of the Committee to Consider and Report as to the Duplication of Legal Publications. Chairman Eldon P. James, of Massachusetts, stated that the committee's first recommendation was that a standing committee of the Association be appointed to deal not only with duplication but also with all problems in connection with publications. He had been informed, however, that such action involved amendment of the By-Laws and as the required notice had not been given, the recommendation could not be taken up at this time. The second resolution had a bearing on the first and for that reason would be passed over for the present.

The committee's third recommendation was that it be directed to work in close cooperation with similar committees of the American Law Institute, the Association of American Law Schools, the American Association of Law Libraries and committees of State and local Bar Associations, in order to bring the opinion of the organized Bar and other branches of the legal profession to bear in the solution of problems developed through study of legal publications and law reporting. The fourth resolution urged State and local Bar Associations which have not yet appointed committees on the subject to do so at the earliest possible moment. Both these resolutions had been approved by the Board of Governors and were promptly passed. The first two resolutions involved changes in the By-Laws without proper notice by publication, and no action was asked upon them. The committee was continued.

Mr. Vanderbilt Offers Resolution for Referendum on Child Labor Amendment etc.

The report of the Committee on Labor, Employment and Social Security was passed, in the absence of the Chairman John Lord O'Brian, of New York. The report of the Committee on Admiralty and Maritime Law contained no recommendations and was therefore received and filed. This brought the House to the special order for the day. The Chairman recognized Mr. Arthur T. Vanderbilt, of New Jersey, who spoke as follows:

"I desire to move the following resolutions:

1. RESOLVED, That the House of Delegates approves and adopts the recommendations of the Special Committee as to the Child Labor Amendment.

2. That the House of Delegates, pursuant to the powers vested in it by Article V, Section 10, of the Constitution, hereby authorizes and directs the Board of Governors to conduct a referendum to the membership of the Association upon the matters specified in the report of the Special Committee.

3. That the Special Committee should be further continued as a Special Committee on Amendments and Legislation Relating to Child Labor.

"Mr. Chairman and Members of the House of Delegates, from the time that I was honored with the nomination for the Presidency at Columbus, last January, I resolved that I would refrain from speaking upon any question relating to Bar matters until after I should have been elected. The matter that is here presented, however, is so important that I do not see how I can pass it by either with respect to my own conscience or the welfare of the Association.

"I want to make my position perfectly clear, because there seemed to be a great deal of misunderstanding among various members of the Assembly as to what they were voting on yesterday. My position is that I never had a fair opportunity, because I did not happen to be in the Assembly, being tied up in other

work, to vote upon the original matter as it came before the Assembly years ago.

"I would take the position today that that action of the Association in opposing the original Child Labor Amendment was sound, because no matter what our attitude with respect to child labor may be, and how much we may be opposed to it, there are matters contained in the original Amendment which is still pending before the States that went far beyond the scope of what was perhaps intended by those most interested in abolishing child labor.

Would Favor New Proposed Amendment

"If the matter came before us on a new proposed resolution now pending in the Senate, I would want the opportunity to vote in favor of that, because it seems to me that all of the objections that have been urged to the original resolution have been carefully eliminated from the Amendment now proposed, and that all of the social workers, all of the religious leaders, all of the governmental officials and all of the lawyers, who have considered it, agree that it is an amendment fairly designed to accomplish the beneficent and benevolent purposes intended by the original proposal.

"We all want—or I should think we would all want—an opportunity to vote one way or the other upon those two matters as well as on pending legislation relating to child labor, either in the Congress or in the States.

"As the matter stands, by the action of the Assembly, if it were concurred in here, we would be in the perfectly untenable and ridiculous position of having turned our backs upon one of the foremost questions of the day, after having debated it back and forth in this Association for many years; and therefore I propose in this resolution which I hope will have your concurrence, that we give our members an opportunity to express their views, after reasoned and careful consideration of the question extending over a period of years, both on the proposed amendments and on pending legislation with reference to the matter.

"I don't know how the members will vote. I think their intelligence will tell them in large numbers to condemn the first amendment proposed. I think their intelligence and their generous spirit will tell them in large numbers to vote in favor of the amendment now being considered; but, however that may be, I think we must give them an opportunity to be heard, and for us at this stage of the game to turn our backs upon this important question, one of the most important questions of the day so far as the future generations are concerned, would, it seems to me, be a tremendous step backward for the American Bar Association. I hope our members will not fall in line with the action of the Assembly but, as a deliberative body, will look forward and do their duty."

Chairman Morris: "In order that it may be clear what we are working on, Mr. Vanderbilt, as the Chair understands it, has moved the approval, of the recommendation of the Special Committee, which appears on page 298 of the Advance Reports. It might be wise for us to have that report before us. Will you be kind enough to read again, and slowly, your other recommendations?"

Substitute Resolution Offered by Mr. Crump

Mr. Vanderbilt complied, and at the conclusion of the reading, Mr. Guy Crump, of California, offered the following substitute resolution and moved its adoption:

WHEREAS, The American Bar Association has heretofore gone on record as opposed to the pending Constitutional Amendment relating to child labor in form as presented in 1924 to the states for approval; and

WHEREAS, The American Bar Association is not now and has never been opposed to an appropriate amendment or appropriate legislation limiting or prohibiting the employment of children for hire;

NOW THEREFORE BE IT RESOLVED, That the report of the Committee to Oppose Ratification by States of the Federal Child Labor Amendment be received and filed and the Committee discharged.

The motion was seconded and Mr. Crump spoke in support of his substitute. In his talk in the Assembly yesterday he felt he was speaking for a large group in the Association who felt that the subject was one which the Association probably should not have taken up in the first place, as it was a matter of social legislation, but in any event it had caused the Association constant trouble since it took it up. Our position had been constantly misrepresented and there were few, if any, who did not want to get rid of it. But the question was how best to do that.

Somebody had said to him that the question was whether we should give it a ten-cent burial or a three thousand dollar burial by means of a referendum. But just look at the recommendations of the Special Committee—that a referendum be taken upon the pending amendment, upon any proposed substitute amendment, upon the proposals to deal with the subject by Federal and State legislation, and upon any other related matters upon which the committee may desire instructions. How many referenda are we going to have and how much of the funds of the Association are we going to use up for this purpose? We are getting into a situation where we shall be using untold funds of the Association on a matter which we had better kill now and kill completely."

Attitude of Junior Bar Conference Stated

Mr. Joseph D. Stecher, of Ohio, was recognized. He wished to state that, following the action of the Assembly yesterday, the Junior Bar Conference, representing some five thousand members, had by unanimous action of its Council approved all the recommendations of the committee with the exception of one that called for the continuance of the committee under its present name. That point, however, had been taken care of by Mr. Vanderbilt's resolution. Their feeling in the matter was that the Child Labor question had caused more criticism and misunderstanding of the Association than any other question that it had dealt with.

"It seems to us, however," Mr. Stecher continued, "that we cannot correct that criticism by dropping this matter like a hot potato at the present time; that under the democratic organization now set up the only fair thing to do is to give the members of this Association an opportunity to express themselves on these various proposals. We feel that in justice to the Association we should not drop the matter but clarify our position.

"It is our understanding that the referendum which is proposed is not a separate referendum on each of the various proposals which will be made, but a referendum embracing in one communication all of the various proposals which have now been made in order to deal with this subject. I merely rise as an ex-officio

member of the House, being Chairman of the Conference, to express the views of the younger lawyers represented through their council."

Mr. John H. Riordan, of California, suggested that Mr. Vanderbilt and the gentleman from California should be able to arrive at a compromise. The lay opinion in this country seemed to be that the lawyers were willing to stand for the exploitation of little girls and little boys. In order to remove that false impression, he would like to suggest to Mr. Vanderbilt that he put a paragraph or sentence into his resolution stating that we are not opposed to a proper amendment on the subject, and to ask Mr. Crump, in view of the democracy of the organization, not to oppose submission of the question to a referendum.

Mr. Frank W. Grinnell, of Massachusetts, stated that the opposition thus far had been to the amendment submitted in 1924. It was the opinion of many that the amendment is not legally pending before the States. It was referred to in the resolutions as the pending amendment, but he challenged that as a matter of constitutional law. He wished to ask if we are to have a referendum, and he was inclined to favor that view, if it would not be better to have one on the Vandenburg amendment, and so get the opinion of the Bar on an amendment which does not have the controversial aspects of the 1924 amendment and which is still before the country and not legally dead. Chairman Morris pointed out that by the terms of the committee's recommendation the Board of Governors would be authorized to have a referendum not only on the amendments which the speaker had mentioned but also on any other amendment which might appear in the picture. Mr. Crump asked leave to strike the word "pending" from the first clause of his resolution, and this was done without objection.

Mr. D. A. Simmons, of Texas, rose to support Mr. Crump's motion that the House concur in the action of the Assembly, but not for the reason he had given. His point was that under the Constitution and By-Laws the Association was not a body to decide all of the political matters in the United States. "When we go out to fight the battles of prohibition," he continued, "and the battle of child labor, and the long and the short haul of the railroads, we are stepping aside from our activity and are taking on a burden of citizenship that we may wish to carry in some other capacity but which does not belong to us as members of this Association. As far as I am concerned, I want the American Bar Association and this House of Delegates in its new capacity and responsibility, where we represent 70,000 to 80,000 lawyers, to confine itself to the propositions that they have adopted for us."

"Give All an Opportunity to Decide Question"

Mr. William L. Ransom, of New York, was recognized and spoke in part as follows:

"I look upon this matter as one of the good faith and regularity of our proceedings here in Kansas City, in relation to our whole membership in the American Bar Association. I may say, as some of you know, that for twenty-five years I have publicly advocated a constitutional amendment regarding child labor. I may say, as some of you know, that when the amendment was submitted to the states in 1924 I favored its ratification. Reluctantly I have reached the conclusion that it goes too far, but when the action was taken by this Association, I both regretted and opposed that action. I believed the American Bar Association was not wise in taking it up, when and as it did.

"But when that action was taken it represented the majority view of those who came to four successive annual meetings: Boston, where the matter was thoroughly discussed,—and I may say that I urged, by every agency of publicity available to the Association, that members who were interested in this subject should show up in Boston and vote upon the question; Los Angeles; Grand Rapids; Milwaukee—in those different parts of the country, a majority of those who came to those meetings voted the attitude of the Association, with which some others were not in sympathy.

"Now we come to this situation. We have erected here a democratic procedure. I cannot recognize the rights of the large number of people who have come to this meeting to reverse and destroy the policy which had been adopted, in the days when we had only an Assembly, by four successive annual meetings. It seems to me that from the viewpoint of the members, the 30,000 members throughout this country, the members who perhaps were too far distant from Kansas City to be here, that we should as a matter of regularity and good faith give them all the opportunity to decide what should be done about this matter.

"Speaking at least for the State from which I come, I realize that there are members of this Association who would be profoundly disappointed and intensely aggrieved if the action for which they have voted in various annual meetings were to be set aside now merely by the action here in Kansas City, without giving the whole Association a chance to vote on it.

"We have had an instance of what a referendum does, on the Court issue. Our members divided sharply on that. There was a substantial minority in our membership who did not agree with the views voted by the majority, but to the credit of American lawyers be it said that there was then, and there has been since, comparatively little remonstrance from the minority of the Association with respect to its acts in carrying out the mandates voted, not by any group less than the full membership of the Association. We can't get rid of this thing merely by tabling it here. The fair thing is to let it go to the Association membership rather than undertake to reverse four years' action by the casual action of the Assembly in one meeting."

Judge Wood Proposes Substitute for Resolution

Mr. John Perry Wood, of California, was recognized. He said:

"What Mr. Vanderbilt said and what was said by the other two speakers I quite agree with. It seems to me, however, that neither of the resolutions before us meets our situation. We are in this situation. The American Bar Association years ago entered into a field into which it probably should not have entered. However, having expressed itself as it has, it has been put in a position unjustly, unfortunately for the Association, unfortunately for the cause which most of the Association would support, of being the representative of economic royalists who desire to make money by grinding the flesh and blood from the children.

"Now it is proposed that we avoid the situation in which we are, on the one hand, by laying everything on the table and quitting, on the other by a referendum. The first it seems to me we should not do. The question in my mind is, whether the second be necessary, whether the matter cannot be disposed of adequately at this Kansas City meeting. Certainly most of the

American lawyers properly advised in the proper accompanying statement would vote against the old amendment and would vote in favor of the Vandenberg amendment. I take it that the members of this House and the great body of those in the Assembly would feel likewise. Why not, therefore, in this House and in the Assembly have an expression upon the matter which will dispose of it once and for all? . . . I offer this as a substitute for the two pending resolutions:

"'BE IT RESOLVED, That the employment of children in industry is detrimental to society and should be prohibited by law and the Congress should be empowered by appropriate constitutional amendment to legislate upon the subject.

"'BE IT FURTHER RESOLVED, That whereas the constitutional amendment proposed in 1924 is not, and the Vandenberg proposed amendment is, well designed to enable Congress properly to prohibit or regulate child labor, that the House disapprove the former and approve and recommend the adoption of the latter.

"'BE IT FURTHER RESOLVED, That the Uniform Child Labor Act should be passed by the legislatures of the respective states.'

"I submit if we are of a mind to adopt this resolution we have expressed ourselves properly here and before the public on the subject of child labor, we have expressed our opposition to the old amendment, we have expressed our approval of an amendment which, the consensus of opinion of all those who have spoken on the subject shows, properly meets the situation."

Mr. G. Dexter Blount, of Colorado, was impressed by the substitute offered by Judge Wood. Members of the House represent approximately 100,000 lawyers in the United States. We are here to legislate on their behalf as Congress legislates on behalf of the people. Why shouldn't Delegates express the opinion of those lawyers as they see it, instead of having a referendum of the lawyers of the American Bar Association alone? Some people have an idea that whenever a troublesome question arises, there should be a referendum on it. Each referendum will cost about $5,000 and if we are going to have one on every question which we are not courageous enough to settle here, we are going to have to have more money to function than we have at present.

Mr. George L. Buist, of South Carolina, was thoroughly in accord with the remarks of Judge Wood and Mr. Blount. He had arisen merely to suggest to Judge Wood that he insert at the beginning of his resolution a definite statement that the Bar is now and has been at all times opposed to the exploitation of children in industry.

Proposals for Reaching an Accord

Mr. Vanderbilt was recognized to speak on the Wood substitute. "I think we are all in accord," he said, "as to what we want to do, and there is merely a little difference as to the method of reaching the desired result. I am willing to show my spirit of cooperation by accepting the two preambles of Mr. Crump's resolutions, which state very clearly, it seems to me, what we are aiming at.

"I am in thorough accord with every one of the four propositions laid down in Judge Wood's resolutions. They meet exactly my point of view and I think they represent the point of view of the rank and file of the Association here and throughout the land, but I do not think that we can afford to ignore the point made by Judge Ransom; namely, that this matter has been voted upon in four successive meetings; that members who are not here today but who were present at the other meetings will not have an opportunity to vote on the matter now before us. There will be dissatisfaction, inevitably, unless they are given an opportunity to cast their vote, and, if they all cast their vote, I am sure that as good American citizens and as intelligent lawyers, they will abide by the result of the referendum.

"As Chairman of the Budget Committee, nobody knows better than I do that we haven't any money to waste, but it seems to me merely as a matter of public relations work, merely as a matter of setting ourselves straight before the public, merely as a matter of commanding the support and the respect of the thirty thousand members of this Association, that we owe it to ourselves here as members of the House of Delegates, to let the matter go to a referendum.

"I don't care if it is coupled with Judge Wood's resolution; I could cheerfully vote for every one of those propositions, but in a matter that has been debated pro and con as much as this has, over a period of years, it does not seem to me that we would be acting wisely, acting with proper foresight, if we did not give every member a chance to pass upon the matter. Mr. Chairman, I am in hopes that Judge Crump, after my generous gesture of accepting his two preambles which make up, as a matter of space, about nine-tenths of his resolution, will see his way to join forces with Judge Wood and myself and produce a result that seems rather obviously to be desired by all the members of the House."

Financial Aspects of Matter Considered

Mr. Walter P. Armstrong, of Tennessee, arose to inquire of Mr. Vanderbilt, as chairman of the Budget Committee, if the finances of the Association would permit this referendum. Mr. Vanderbilt replied that if they had stopped to consider the cost of the two referenda on the Supreme Court issue, they probably would have said, as a matter of cold calculation, that they didn't have the money for them, but they found today that they were going to have the money to pay for them. It did seem to him that they could manage to find the $3,000 or $3,500 which might be necessary to pay for the referendum, and that the Association's finances would stand it. Mr. Armstrong then asked if his position was not this: that, notwithstanding the financial situation of the Association, it was so important to have a vote of the membership on the question that he, as chairman of the Budget Committee, was in favor of spending the amount necessary. Mr. Vanderbilt replied that the statement was correct.

Mr. Hogan, of the District of Columbia, rose to give some figures to correct exaggerated estimates of the cost of the referendum. Mr. Walter S. Ruff, of Ohio, inquired why they wished to go to the expense of a referendum in States like Ohio, where there wasn't any child labor problem. The lawyers there wouldn't know what they were talking about. Mr. Charles M. Thomson, of Illinois, expressed a similar view. What are the delegates here for if not to represent their constituents and to act with such intelligence as they may have? The fact that members had voted one way or another in previous meetings had nothing to do with the question of whether delegates should not face and do their plain duty. Everyone seemed to think that the Vandenberg Amendment was going to iron out all difficulties and all the objections to the so-called pending amendment, and under such circumstances he did not think the House had any business spending the funds of the Association on a referendum at this time.

Mr. Blaine Hallock, of Oregon, suggested that, after all, the delegates were not far apart. By adopting the Wood resolution the attitude of the House could be put on record. By adopting the Crump resolution, they would back up the Assembly, and this would not be inconsistent with the adoption of the Vanderbilt resolution, if all reference to the 1924 amendment were eliminated.

Urges Support of Vanderbilt Resolution

Mr. Sylvester C. Smith, of New Jersey, stated that his committee (on the Supreme Court Proposal) had been closer to the reactions of the public to the position taken by the American Bar Association than any other group in the Association with the possible exception of its officers and members of the Board of Governors. If we have been misrepresented, it is because we have been a little deaf to what the public was saying about us and our position. He continued:

"I am going to support and urge you to support the Vanderbilt resolution because of the position in which my committee was placed in answering and refuting the accusations made against the American Bar Association, because I believe that we cannot run away from this subject. I do not believe that some of the members who are speaking here are familiar with the situation at Washington today. For the benefit of Judge Thomson, the resolution introduced by Senator Vandenberg is already in the Senate. There has been criticism on the part of some members of the Senate as to the wording of that resolution. Mr. Hogan, I think, approves it; I think a great number of the Senators approve of the wording of that particular resolution; but I question whether there are members of the House of Delegates who, if they had the wording of that resolution before them and were considering speaking for their constituent lawyers in their states, would now want to approve that specific amendment.

Purpose of Referendum

"The purpose of the referendum is to submit clearly to the members of the American Bar Association the specific propositions that are before us. I do not agree with Mr. Grinnell that there is no pending amendment. . . . And it is all very well to say that in Ohio there are no abuses of child labor. If that were true of the whole country, why would we have this discussion? The fact is that we as lawyers cannot be blind to them; we as citizens must know that there has been exploitation of children in industry and we should disapprove it.

"I feel that, with the preamble of Mr. Crump, the resolution of Mr. Vanderbilt should be supported and adopted by the House. The finest thing we could do before the Senate of the United States, in trying to present our cause in defense of the courts, would be to show that we have given the lawyers a chance to vote. If you don't do that your Association will still be a representative body, only we will be called, on this particular question, the representatives of special interest groups, we will still be known as men who are controlled by the size of retainers. When we are democratic in our procedure and go to the membership on these questions that can be intelligently submitted to them and voted upon, we will secure an expression of opinion that will put us in a true light before the American people and command new respect for us. I urge the support of Mr. Vanderbilt's amendment."

Mr. Harry N. Gottlieb, of Illinois, believed that the American Bar Association should go on record on this question and he didn't care very much whether it did it now or by referendum. But he had considerable sympathy with the question raised by Mr. Simmons as to whether this was a proper matter for action by the Association. It was only because of the past history of the question that he thought the Association should act clearly on it now, but he would regard it as very unfortunate if such action should be regarded as setting the policy of the Association to express its official opinion in future on this type of question. He thought this was the major problem that would confront the Association in its future meetings.

Association Should Refute False Charges

Mr. Robert Stone, of Kansas, supported the motion to submit the matter to a referendum. Answering the suggestion of Mr. Simmons, he did not know what body could better consider a proposal to amend the Constitution of the United States than a body of lawyers. The Association had been charged with opposing any law which would look toward outlawing the exploitation of child labor. That was an unjust accusation and the profession had a right to clear its record and to speak, not by the House as a representative body but directly to the people of America and refute the false charge. The members should be allowed to vote for or against the old amendment, for or against the Vandenberg amendment, and on the fundamental question of whether the States can control the situation by their own laws and with the proper Federal legislation, as suggested in the Kentucky Whip case, recently decided.

Mr. Thomas B. Gay, of Virginia, speaking to the suggestion that the matter was beyond the letter of the Constitutional statement of the purposes of the Association, pointed out that the By-Laws defined the powers of a number of committees and most of these were not within the letter of the Constitution, under the strict interpretation which had been announced. He did not think the question could fairly be said to be not within the spirit of the Constitution. Mr. William L. Ransom asked that the speaker read to the House the provisions of the Constitution, Article V, Section 4 which define the scope of the House of Delegates. Mr. Gay thereupon read the section which authorizes the House of Delegates to submit to the members "defined questions affecting the substance or the administration of the law or affecting the policy or recommendations of this Association which in the opinion of the House of Delegates are of immediate and practical consequence to the legal profession and the public throughout the United States." The question certainly was of immediate and practical consequence to profession and public; and he could not conceive of one which was better designed to form the basis of a referendum.

Amended Resolution Adopted by Big Majority

Mr. John H. Riordan, of California, moved the previous question. Carried. The substitute motion of Judge Wood was thereupon put to a vote and failed. The Crump substitute was then before the House. Mr. Crump stated that there was not very much difference between Mr. Vanderbilt and himself and that if the House thought a referendum should be had, it was satisfactory to him. He merely wished to inquire if the two preambles to his resolution would be accepted by Mr. Vanderbilt, in case the motion to adopt his substitute failed. He was assured that they would be. The Crump resolution was thereupon put to a vote and defeated. Mr. Vanderbilt then moved to amend his own

THINGS DONE AT THE SIXTIETH ANNUAL MEETING

APPROVED recommendations in report of Committee on Child Labor Amendment, and ordered referendum to members of Association on pending Amendment, the proposed Vandenberg Amendment, and proposal to deal with the subject by Federal and State legislation.

Provided for a Special Committee of seven members to continue advocacy of the views voted by the membership of the Association in behalf of an independent judiciary, such committee to assist, in any way that may be requested, the Special Committee created by the Senate and House of Representatives to study and report as to the judicial system of the United States.

Provided that, in the event that substantial changes affecting the Supreme Court or other Federal Courts are proposed at a future session of the Congress, a referendum vote of the membership of the Association shall be taken, the results to constitute instructions of the Association to such Special Committee.

Petitioned Senate of the United States to establish a rule requiring every nomination for judicial office to be referred to an appropriate committee, and requiring such committee, in every instance, to afford a full public hearing on fitness and qualifications of nominee for judicial office.

Created Special Committee of five members to investigate and approve Law Lists, and adopted standards to which Lists seeking approval of the Association must conform.

Adopted amendments to Constitution "staggering" terms of Delegates and changing name of Judicial Section to "Section of Judicial Administration"; amended By-laws to provide for creation of "sustaining memberships."

Urged Congress to pass H. J. 19, providing that the income from the Holmes Bequest be set aside for purposes indicated.

Approved, in principle, a bill "to provide for more tion, Newspaper Publishers Association and American Society of Newspaper Editors, as to points agreed on by representatives of the three bodies as to publicity interfering with fair trial of judicial and quasi-judicial proceedings.

Recommended that selective civil service be extended to all lawyers in service of the United States below grades of cabinet officers and assistant secretaries of departments, including members of commissions and boards engaged in quasi-judicial work and not holding policy-making positions.

Approved, in principle, a bill "to provide for more expeditious settlement of disputes with the United States," and referred same to the Board of Governors with power to act.

Approved, in principle, a bill "to provide for more giving information as to, and designed to stimulate, surveys of the economic condition of the Bar.

Recommended amendment of Section 77B of the Bankruptcy Act to prevent the treatment of modification, alteration, cancellation or forgiveness of indebtedness as income to the debtor corporation in reorganization proceedings.

Opposed legislation combining or associating the Board of Tax Appeals with agencies for reviewing determinations of administrative authorities concerned with regulatory laws.

Urged State and local Bar Associations, which have not already done so, to appoint committees on duplication of legal publications.

Adopted two new canons of judicial ethics with regard to improper publicizing of court proceedngs and conduct of court proceedings, and amended several other canons.

Recommended extension of National Firearms Act of June 26, 1934, or other appropriate legislation to regulate traffic in, and transportation of, pistols and revolvers.

Decided to sponsor and encourage a nation-wide program of post-admission legal education for the benefit of the legal profession.

Approved S. B. 478, for transfer of the registration of prints and labels from the Patent Office to the Copyright Office; H. B. 7779, providing for registration of trademarks of an association, organization or commission.

Created a new committee to deal with securities laws and regulations.

Referred model act presented by Section of Insurance Law to the Board of Governors, with power to act.

Recommended negotiation of additional treaties to prevent international double taxation and for mutual assistance against tax evasion.

Recommended publication of general revision of Moore's Digest of International Law and periodical supplement; also that national Bar Associations of the several nations unite in a cooperative project to restate International Law; recommended the adoption of an international statute on limitations on diplomatic claims; urged prompt submission to Congress of recommendations relating to complete revision and codification of laws relating to nationalty.

Approved establishment of an American Academy of International Law.

Approved resolution for a School of Comparative Law adopted at Second International Congress of Comparative Law at the Hague, in 1937.

Approved H. R. 2271, for the removal of District Judges, with certain amendments.

Approved Rules for Civil Procedure of the District Courts of the United States, as reported by the Advisory Committee as of April 30, 1937, with such changes as the Advisory Committee may deem advisable.

Selected "The Extent to which Fact-Finding Boards Should be Bound by Rules of Evidence," as subject for 1938 contest under Ross Bequest.

Urged enactment of a Federal Sales Act in substantially the form of H. R. 7824, with such further amendments as seem proper.

Authorized Committee on Commerce to cooperate with any commission or governmental body undertaking survey of anti-trust laws; disapproved S. 1730, exempting sales made to the Federal government, etc., from the provisions of the Robinson-Patman Act.

Adopted a resolution of thanks to the hospitable and generous hosts of the Association.

resolution by adopting the two preambles of the Crump resolution, and the motion prevailed. The vote was then taken on the amended Vanderbilt resolution and the result was 112 for and 15 against.

Special Committee on Law Lists Reports

Mr. Earle W. Evans, of Kansas, Chairman of the Special Committee on Law Lists, presented its report. No American lawyer, he said, who has an accessible office or receives mail will doubt that there is a law list problem in the country today. It has been with us for some thirty years or more, and during that time some practices which have taken deep root have become objectionable and regrettable not only to the Bar but also to the better law list men themselves.

"The Association has undertaken several times before to deal with phases of this question," he continued, "but never before with the question as a whole. Questions which had to do with law lists were constantly being presented to the Committees on Unauthorized Practice of the Law and Professional Ethics and Grievances, also a committee no longer in existence known as the Ethics Committee, and so grave had the question become in those committees that in 1925 they joined in a request that a special committee be authorized and appointed to investigate and report with recommendations upon all phases of the law lists problem deemed of interest to the public.

"Pursuant to that this committee was created and has been industriously engaged in carrying out the mandate ever since. We found immediately that of the multitude of questions involved in the problem there was scarcely one not highly controversial, that practically every lawyer of the United States had had some dealings with at least one law list, and from that experience had reached a conclusion which he was perfectly willing to express and upon which to form his judgment. We proceeded in our investigation, in the first instance, upon the belief that that solution of the problem would best serve the profession which best served the public interests, and in order that we might ascertain facts and opinions from those interested and having opinions and experience, we sent out some 5,000 questionnaires to lawyers of three separate and distinct classes, to publishers of law lists, and to other laymen who, we were advised by members of the then general council of the various States, might be deemed to be interested in the question.

Getting a Basis for Committee Recommendations

"In addition to that we had three public hearings at which we heard at length every person who appeared and wanted to be heard. No one was curtailed as to time and, except as to the last one, no one was curtailed as to the subject matter of the discussion. In addition to that, we have received not less than 15,000 letters from members of the profession and merchants and others who felt interested in the subject, expressing their opinions and giving their experiences.

"We readily reached the conclusion that a law list or law lists could be so published and circulated and used as to promote a useful purpose. That question was seriously controverted by a very considerable number of the profession, but the return disclosed an overwhelming opinion to the contrary. Having thus determined, as we did, upon the basis of those returns, that law lists could be made to serve a useful purpose, we began our inquiry to determine the kind of law list that could be best relied upon for that purpose and particularly the kind of a law list that served no useful purpose, public or private, except the interest of the publisher. The result of our investigations and of these hearings is embodied in the report before you today on page 276.

"The committee does not wish it understood that it presents this report as representing all that should ultimately be done either with respect to restricting law list companies or to loosening the strings from them. All that it is intended to do is to present a start, something in which the regulation of law lists will be recognized and as respects which a future committee can, by experience and education, approach approximately the perfection of standards to be employed in that respect."

Recommendations Presented and Adopted

The previous question was moved and voted, after which Chairman Evans presented the Committee's first recommendation, as follows:

I.

That a Special Committee of five members be created and respectively authorized, empowered and directed to

(a) procure information regarding Law Lists and from time to time advise members of the Association thereof;

(b) recommend to the Association for adoption from time to time such standards or rules, and amendments thereof, for Law Lists as may seem in the interest of the public;

(c) adopt, and from time to time amend, such reasonable rules and regulations for the conduct of its investigations as it may find desirable;

(d) endeavor to protect the public and members of the profession from dishonest, fraudulent or unworthy conduct of persons who represent, or claim to represent, Law Lists;

(e) cooperate with law enforcement officers and others interested in the censure or punishment of such dishonest, fraudulent or unworthy conduct;

(f) investigate, at the expense of the respective applicants, applications received for the approval, by the Association, of Law Lists;

(g) approve such of the Law Lists as are found, upon such investigation, to have complied with the rules and standards of the Association and the regulations of the Committee, and revoke, conditionally or otherwise, the approval of any such Law List if the committee finds that its issuer has, after approval, violated any of such rules, standards or regulations;

(h) take such action as it may deem advisable to cause the approval, or revocation thereof, of Law Lists to be made known to the members of the Association.

Mr. John T. Barker, of Missouri, objected on the ground that the report does not specifically prevent the bonding of lawyers, has no specific provision against solicitation of commercial business, and allows Law Lists to charge in proportion to business furnished the lawyer. He thought these should all be definitely prohibited.

Rules or Standards for Law Lists Set Forth

On vote the recommendation was adopted. Chairman Evans then presented the next recommendation:

II.

That the following Rules or Standards, and each of them, be adopted as and for Law Lists in which lawyers may permit their names and professional card to appear:

1. Every list of attorneys at law, legal directory or other instrumentality maintained or published primarily

for the purpose of circulating or presenting the name or names of any attorney or attorneys at law as probably available for professional employment, shall be deemed a Law List.

2. The purchase or use of an approved Law List may be recommended to attorneys at law, or laymen, by its issuer, only on the basis of the circulation, physical makeup and accuracy thereof, and the extent to which lawyers listed therein have been investigated. Efforts by the issuer of a Law List to otherwise secure employment for any attorney listed therein, or presented thereby, shall be deemed ground for disapproval, or for the withdrawal of approval.

3. No Law List shall be approved or continue to be approved

(a) if, in connection with the preparation, publication, distribution or presentation thereof, the issuer does, causes, permits to be done, encourages or participates in the doing of, any act or thing which, directly or indirectly, violates the Canons of Ethics of this Association, or which constitutes the unlawful practice of the law;

(b) which shall be conducted upon a basis which does not tend to promote the public interest, or which employs any practice not in accord with a high standard of business conduct;

(c) or if the price for representation, or listing therein, is not uniform within reasonably prescribed areas, or is exorbitant;

(d) or if any obligation is assumed by either user or attorney, to employ, exclusively or preferentially, in the forwarding, receiving or exchange of legal business, the attorneys listed therein;

(e) or if in the physical makeup thereof, preferential prominence shall be given to the name of any attorney or attorneys listed therein, by different size or character of type, underscoring or other methods employed by printers for emphasis or to attract attention; but the foregoing shall not prohibit the publication in the geographical section of a Law List of such professional card as the Canons permit or of a reference there to such card in another section of the book;

(f) or if the issuer thereof shall endeavor to direct, or control, the professional activities of any attorney listed therein or presented thereby;

(g) or if such Law List shall be published or issued as a part of any professional, commercial, trade or business publication or journal;

(h) or if the issuer thereof shall neglect or refuse to promptly and fully (a) notify the Association in writing of any payment or payments made by such issuer, or by an indemnitor, upon claims or defalcation by a listed attorney, or to (b) cooperate, at the request of the Association, in the investigation, ascertainment and proof of the facts of such claims.

4. These rules shall be effective as to Law Lists published, circulated or maintained on or after July 1, 1938.

The Committee's last recommendation—that it be discharged—was also adopted.

Two New Canons of Professional Ethics Adopted

Mr. Herschel W. Arant of Ohio, member and secretary of the Standing Committee on Professional Ethics and Grievances, presented its report and supplementary report. He suggested that the supplementary report was long and that it might expedite matters if he moved the adoption of the recommendations as a whole, leaving it to members to take up any particular paragraph to which they found objection. There was no objection and this procedure was followed. Mr. Arant said:

"The amendments to the Canons which are offered here for your consideration have been formulated and recommended to you after one year of work by the committee, which has been devoted, I may say perhaps in major part, to a study of the Canons of Ethics particularly with respect to necessary or desirable amendments. The committee has sought widely for suggestions. It has sent out many letters to persons believed to be particularly interested in this matter and qualified to give worthwhile suggestions to the committee. It has extended a general invitation through the pages of the American Bar Association Journal for such suggestions. All such suggestions have received the committee's careful consideration. These changes, some of greater and some of lesser importance, have all been arrived at by that process. The committee therefore recommends, and I move, that the committee's report be adopted as it appears on pages 140 to 146 inclusive of the official advance program."

The motion was seconded and the whole list of recommendations was adopted without discussion. The two new Canons adopted and the amendments to other Canons were printed in full in the August issue of the JOURNAL (p. 635).

Chairman Harold J. Gallagher, of the Committee on Commerce, presented its report. It had previously been considered by the Assembly which had approved it with the exception of Recommendation No. III, favoring the enactment of H. R. 1668, repealing the long and short haul clause of the Interstate Commerce Act, and Recommendation No. VIII, disapproving the enactment of S. 1261, which would give the Interstate Commerce Commission the unrestricted right to establish through routes between railroads. The Chairman moved the adoption of all the recommendations except the two disapproved by the Assembly, and the motion prevailed.

A Jurisdictional Matter Settled

Mr. Stanley B. Houck, of Minnesota, Chairman of the Committee on Unauthorized Practice of the Law, presented its report. He said that he understood that the Board of Governors had made certain recommendations with respect to the report and asked Secretary Knight to read them. They were, first, to the effect that the adoption of the recommendations of the committee (as printed in the Advance Program) would require an amendment to the By-Laws, and that the proposed amendment had not been duly filed and notice thereof given, as required by the Constitution; and

2. That it is the sense of the Board, and the Board recommends to the House of Delegates that it declare that it is desirable that all matters involving or affecting questions of the unauthorized practice of law, arising at any time in connection with the work of any committee or Section of the Association, should be referred by such committee or Section to the Committee on Unauthorized Practice of the Law for its advice and opinion; further, that the determination of questions as to what constitutes unauthorized practice of law is not within the jurisdiction of any Section or Committee of the Association or Section other than the Committee on Unauthorized Practice of the Law and the Committee on Professional Ethics and Grievances, pursuant to the By-Laws.

Chairman Houck moved that the recommendations of the Board of Governors be substituted for that of the committee. Adopted.

(*Continued on page 886*)

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THE BAR MOVES AHEAD

With the membership of the Association at its all-time high, American lawyers came to Kansas City in greater number than to any previous annual meeting, exceeding even the throng which gathered in Boston in 1936 to vote adoption of the new structure of organization. But the significance and success of the 1937 sessions go much deeper than the attendance recorded in spite of the unfavorable time of meeting.

Tangible advantages from the new procedures were realized according to expectations. Advance designation enabled the unopposed nominee for President to arrange his affairs so as to enter upon his duties at once, exercise a bold leadership in the House of Delegates as to matters affecting policies of the coming year, announce upon his election his point of view and the salient points of his program for the work at hand, and leave Kansas City with the Committees for the coming year constituted and functioning, with the exception of one or two which were completed within a few days following. Conferences with Section and Committee Chairmen were held before adjournment; and arrangements were made to enlist the cooperation of outstanding men, in the respective fields, in the State and local Bar Associations. Under the old system of nominating and electing a President on the closing days of the convention, the Committees could not be appointed and announced until two or three months after the annual meeting; their work was at virtual standstill meanwhile; and the President of the Association rarely met with the Chairmen of Committees, or even the Section Chairmen, if at all, before the annual meeting at which his term of office was to end. By virtue of the changes which became operative for the first time at the 1937 meeting, this year's work is "off to a running start," and the autumn days will not be lost.

Missouri and the Southwest naturally predominated in the attendance. The gathering was of lawyers such as do the real work of the profession, in private practice and in public office, in every part of every State, particularly in the smaller communities. It was a thoroughly enjoyable meeting, made more so by the delightful hospitality of our hosts; but it was also a *working* meeting, which devoted itself earnestly to many tasks and accomplished a great deal that will receive the approbation of the public as well as the profession. A meeting of the Association as at present organized is to be judged by what it *does;* and by this standard, the 60th annual meeting will be recognized and remembered as marking a substantial advance, in many respects. In all that was decided upon and done, there was manifest an awareness that to serve faithfully the best interests of the whole public will best promote the interests of the members of the profession of law.

The House of Delegates attained stature as the representative body of the Association and the profession. Its sessions were impressive, attracted large audiences, and resulted in a surprising amount of constructive and well-considered action, nearly all of an affirmative character. A long-needed revision of the Canons of Ethics was adopted; and two new Canons of Judicial Ethics were added, as to the improper publicizing of Court proceedings (photography and radio broadcasts) and the dignified conduct of Court proceedings. The twelve-year struggle that the Association "do something" to curb the abuses and burdens of law lists was brought to the stage of moderate action, through the adoption of rules and standards for supervising such publications and the setting up of an Association tribunal to apply

and administer such standards on and after July 1, 1938. Canon 43 of the Canons of Professional Ethics was changed to read:

"*Approved Law Lists.* It shall be improper for a lawyer to permit his name to be published after January 1, 1939, in a law list that is not approved by the American Bar Association."

A Special Committee on Proposals Affecting the Supreme Court of the United States was created, by unopposed action of the Assembly and the House, to continue the constructive and conserving work begun last February. The endorsement of the Association was given to the improved form of the proposed uniform rules for the Courts of the United States; and suggestions were offered, for the final draft. Approval was accorded to noteworthy progress made along lines of cooperation between the press and the bar, under the leadership of Mr. Newton D. Baker, to lessen prejudicial publicity of judicial proceedings. In numerous other respects, the House gave its backing to measures which, if put in effect, will further improve the administration of justice.

Support was given to the renewed efforts to broaden and extend legal aid work to fulfill the Bar's "outstanding duty to the poor," so that justice will not be denied to anyone for lack of means. The House endorsed cordially the program of Dean Lloyd Garrison's Special Committee for further surveys of the economic condition of the Bar, as pre-requisite to remedial measures. The sole authority of the Association's Committees on Professional Ethics and Grievances and on Unauthorized Practice of the Law was affirmed by the House, as to the determination of what the Association shall deem to constitute unauthorized practice of law. The monumental studies conducted by the Special Committee on Administrative Law were received, and the Committee's recommendations were endorsed in principle, without acceptance that they are yet ready for introduction as legislative measures. In the domain of international and comparative law, the House gave Association sponsorship for several projects that seek peace and amity between nations on the basis of adjudication according to law. In numerous fields of law, the House approved measures that had been carefully drafted by disinterested lawyers deeply experienced in the subjects dealt with.

The sessions of the Assembly at which several major reports by Committees were first acted on, showed increased attendance and interest. The "high spot" was again the "open forum" sessions, at which the Resolutions Committee, headed by Judge L. B. Day of the Supreme Court of Nebraska, reported on all resolutions which had been introduced by members from the floor. So ably had the Resolutions Committee of forty members done its work, after public hearings on the resolutions, that the action recommended by the Committee was taken by the Assembly in every instance but one. This highly significant incident came at the closing session of the Assembly. As to a resolution which proposed in effect that, in deciding the constitutionality of Federal laws, a majority of the members of a Court should defer to the views of a substantial majority, if the latter believed the statute to be valid, a majority report had analyzed and condemned the proposal, on grounds sustained by many previous annual meetings. A minority report by one member of the Committee supported the resolution, for which its author made an earnest argument. The opinion of those present was plainly against the proposal, by a decisive majority; yet the Assembly adopted a motion to refer the resolution and the two reports for study by the Committee on Proposals Affecting the Supreme Court. In support of the motion to refer, it was said that a proposal which had been brought forward in so earnest and reasoned a manner ought not to be either voted down or approved in any casual manner according to preconceived ideas, but should take the regular course, which would mean that it would be voted on by all members of the Association if it should reach the stage of serious consideration. This point of view was sensibly supported by the Assembly.

The Assembly's principal contribution to the affirmative action taken came in the form of a resolution drafted and recommended unanimously by the Resolutions Committee, in lieu of two resolutions proffered from the floor. As

adopted by the Assembly, this resolution respectfully petitioned the Senate of the United States to establish a rule requiring a full public hearing, before vote on confirmation, as to all nominations for judicial office. The House of Delegates unanimously concurred in this remedial recommendation from the "open forum" sessions of the Assembly.

The Section meetings and Committee forums developed unexpectedly large attendance. Even in the spacious Municipal Auditorium, impromptu changes in meeting-place were sometimes necessary, to accommodate those wishing to attend and take part. As usual, many of the most notable addresses were in Section meetings; and certainly one of the most important utterances of the week (that of Assistant General Counsel Kent of the Treasury) was delivered at the tax clinic of the Committee on Federal Taxation. Representation of the Sections and Committees in the House of Delegates, through their Chairmen (the Committee Chairmen without voting power), gave a new sense of unity and integration to the whole week's proceedings. For the first time in the history of the Association, all phases of its work were represented and presented, in the open deliberations of the policy-determining body. As always, the annual meeting was a great forum of open discussion, in which many speakers, by invitation or upon their own initiative, presented their views upon many phases of the law as affecting the public welfare. Each speaker gave his own opinions upon his own responsibility; the attitude and action of the Association were reflected in the *votes* taken according to the established procedures.

Retiring President Stinchfield and those who worked with him have abundant reason to be satisfied with the advance made by the organized Bar during their year. The incoming President takes over the leadership of an Association which is moving ahead. With the 1938 meeting fixed to open July 25th at Cleveland Ohio, less than nine months remain for the work to precede that meeting. The indications are many that even this shorter period will be notable for further accomplishments.

A VIGIL FOR FREE COURTS

In a meeting marked, on many issues, by divided votes by the members present, perhaps the most significant step was the unopposed action of the Assembly and the House of Delegates in creating a Special Committee on Proposals Affecting the Supreme Court of the United States, as means of preparedness to keep an unceasing vigil in behalf of free and independent Courts. Members of the Association have differing opinions on many matters; but no division or dissent was manifest, as to the recommendations submitted by Mr. Sylvester C. Smith, Jr., State Delegate of New Jersey, in behalf of the Special Committee which he headed in Washington during the contest as to re-making the Supreme Court.

The report of this Committee manifests a broad and enlightened approach to the whole problem. It is published elsewhere in this issue, and should be read and studied by every member of the Bar. There will be few, if any, dissents from the Committee's view that "the defense of free Courts is a duty and high privilege of the Bar," nor from its opinion that "the maintenance of an independent and untrammelled judiciary, chosen for qualifications for judicial work, will require unceasing vigilance on the part of lawyers and other citizens." The Committee wisely adds that "constant efforts to improve and speed up the administration of justice will constitute an effective part of that defense."

"WE CANNOT TURN OUR BACKS ON THE CHILD LABOR QUESTION"

All members of the Association will have the opportunity to vote by mail ballot this month, to decide the future attitude and action of the Association upon the various proposals for constitutional amendment or legislation as to the labor of children in industry. Information which may be helpful to members in voting in this referendum is published elsewhere in this issue, in an article prepared at the request of the President of the Association.

The decision to submit these issues to the Association membership was made by the House of Delegates. Article V, Section 10, of

the Constitution of the Association, vests in the House of Delegates the power to submit to referendum "defined questions affecting the substance of the administration of the law or affecting the policy or recommendations of the Association, which in the opinion of the House of Delegates are of immediate, practical importance to the legal profession and the public throughout the United States."

When the report of the Association's Special Committee on the Child Labor Amendment came before the Assembly in Kansas City, a motion to table the report and thereby in effect discharge the Committee shut off debate and received the support of a majority of those present at that session. This action by the Assembly was contrary to that voted by the members present at five previous annual meetings, which had created and continued a Special Committee to oppose ratification of the Amendment submitted to the States in 1924.

In the House of Delegates, the matter was thoroughly and earnestly debated. Mr. Vanderbilt of New Jersey, later elected President of the Association, offered the resolution, published on page 854 of this issue, for a vote by the whole membership of the Association upon not only the 1924 Amendment but also upon other remedial measures, on which the Association had not thus far acted, by referendum or at any annual meeting. He pointed out that the attitude of the Association as to the 1924 Amendment had been made the subject of persistent misrepresentation and attack; he urged an affirmative and remedial rather than purely negative stand. "We cannot turn our backs on the child labor question," he declared. Only the whole membership of the Association should decide its stand to oppose or to favor any particular Amendment, in a fundamental respect, to the Constitution of the United States. Other speakers pointed out that the situation before the House came clearly within the constitutional authorization for a referendum.

The House proved itself a genuinely deliberative body, prepared to accept and act upon its responsibility under the constitutional provision. The debate was on a high level, and proved to be one of the most spirited and significant in the history of the Association. An open-minded and humanitarian outlook on the legal aspects of problems of social welfare was manifest. A consensus of reasoned opinion emerged clearly from the open discussion, and the final vote was 112 to 15 in favor of letting the whole membership decide the Association's stand upon the various proposals. A controlling consideration was that continuity of Association policy would be destroyed if the casual attendance at one meeting, however large, in one locality, could reverse and overthrow the actions voted by the members present at many previous annual meetings, in other localities. The value of the representative House of Delegates as a safeguard of the rights of the whole membership, regardless of the locality of the annual meeting, was strikingly demonstrated.

The House voted also to continue the Committee under the name of the Special Committee on Constitutional Amendments and Legislation as to Child Labor. The results of the referendum will constitute the instructions of the Committee.

So the important issues as to the Association's stand on constitutional amendments and legislation to end the abuses of the Employment of Children in industry go to the whole membership for decision. The American Bar Association is the only National organization of the profession which provides the democratic procedure for eliciting and making available the informed views of nearly 31,000 lawyers—representative of all elements of the profession in every State. Other organizations may be based upon adherence to particular points of view, interests, or specializations; but only the American Bar Association assures to its members the means of expressing their views as a part of a Nation-wide consensus of opinion, and only the American Bar Association contributes to the public discussion of major issues an expression of the informed judgment of nearly 31,000 lawyers who are on its published membership roster and who constitute the rank and file of practising lawyers in every State. Every member of the Association should vote promptly his views upon each of the questions submitted in the present referendum.

OUR GUESTS FROM CANADA

The American Bar was honored and happy in the presence, at its Kansas City meeting, of the Honorable Ernest K. Williams, K. C., of Winnipeg, Manitoba, as delegate of the Canadian Bar Association. This eminent member of the Bar of Canada, and his gracious lady, were most welcome ambassadors of the good will which has long existed between the two great National organizations of the profession of law in North America. They manifested a hearty interest in all proceedings and social activities of the convention, as well as understanding of its spirit and procedures; they truly endeared themselves to the many who had the privilege of meeting them.

At the closing luncheon of the Association, Mr. Williams gave a delightful address, which for scholarship and felicity completely won his hearers. Its topic was appropriately "The Lawyer's Wife," and was of a theme and quality too rarely heard in Bar meetings. The traditions and the dauntless spirit of England and *la belle France* lived again vividly in our midst. This address will be published in the December issue of the *Journal*, and will supplement the visit of these distinguished Canadians, in making still closer the ties between lawyers south and north of the boundary between the Nations.

HELPING YOUR ASSOCIATION TO HELP THE PUBLIC

In her searching study of "The Influence of the American Bar Association upon Public Opinion and Legislation," M. Louise Rutherford demonstrates the conclusion that an organization such as the American Bar Association is of the greatest influence and usefulness when it proceeds along the lines of making available to the administration of justice and to the processes of legislation the assistance and counsel of trained and disinterested experts in the drafting and interpretation of laws and regulations. The author indicates that the Association does not and could not in any way dictate or control public opinion, and has never tried to do so, but that the Association, through its various Sections and Committees and the deliberations of its annual meetings, has in fact rendered invaluable public service in many fields, as an independent and truly expert aid of public opinion.

In the world at large, she finds that the "capacity of democratic government to maintain and defend itself is being questioned"; and, among the reasons, she notes "the failure to organize services of voluntary groups, especially those expert in government and law." Her thesis is that "the voluntary services of unbiased experts in government should be evaluated and used." So varied and considerable have been the public services of the American Bar Association which Mrs. Rutherford assembles from the record, that she appraises it as one of the representative and independent institutions whose vigorous activity may be a bulwark against the rise of arbitrary power in government. Indeed, she finds that the availability and use of such expert adjuncts of democracy are in essence incompatible with dictatorial government.

Mr. Walter Lippmann, in his analysis of "The Good Society," pictures the way in which men and masses of people, confused and harried by the collapse of the institutions and the leadership on which they had leaned, turned to government as the one instrument which had the power and resources, and had re-mobilized the intellectual capacity, to furnish some hope or promise of guidance out of the morass of post-War problems. Had private industry and finance, and the independent, expert institutions in aid of public opinion, been able to supply immediately the leadership which men sought, the people of Europe might not have turned so generally to politically-minded leaders as "agents of destiny." Here again we discern a high appraisal of the potential worth of uncontrolled and expert aids to the democratic process.

By far the greater volume of the work of the American Bar Association, in the many fields in which Mrs. Rutherford confirms that it has been of service, is outside the arena of political controversy, and is not in contested fields at all, except as minor special interests or parochial views may intervene as barriers. In acutely controversial matters, the Association has rarely hesitated to be of such aid as it

could, if the administration of justice or the fundamentals of free institutions were involved; but the bulk of the day-by-day work of the Committees and Sections of the Association does not concern great controversies or attract much attention in the press. Trained and disinterested assistance is none the less given to many of those who have in charge the furtherance of good causes; and at times the support of the informed opinion of the profession is rallied to the support of a measure in the public interest.

The past year has demonstrated beyond a doubt that the representative new structure of the Association has now opened new and broader responsibilities and opportunities. These may be accepted or ignored; that decision depends on the wishes of the members of the Association. There has never been a time when the trained assistance of disinterested groups of lawyers was as widely sought and as willingly accepted, in a variety of matters important to the public and so to members of the profession.

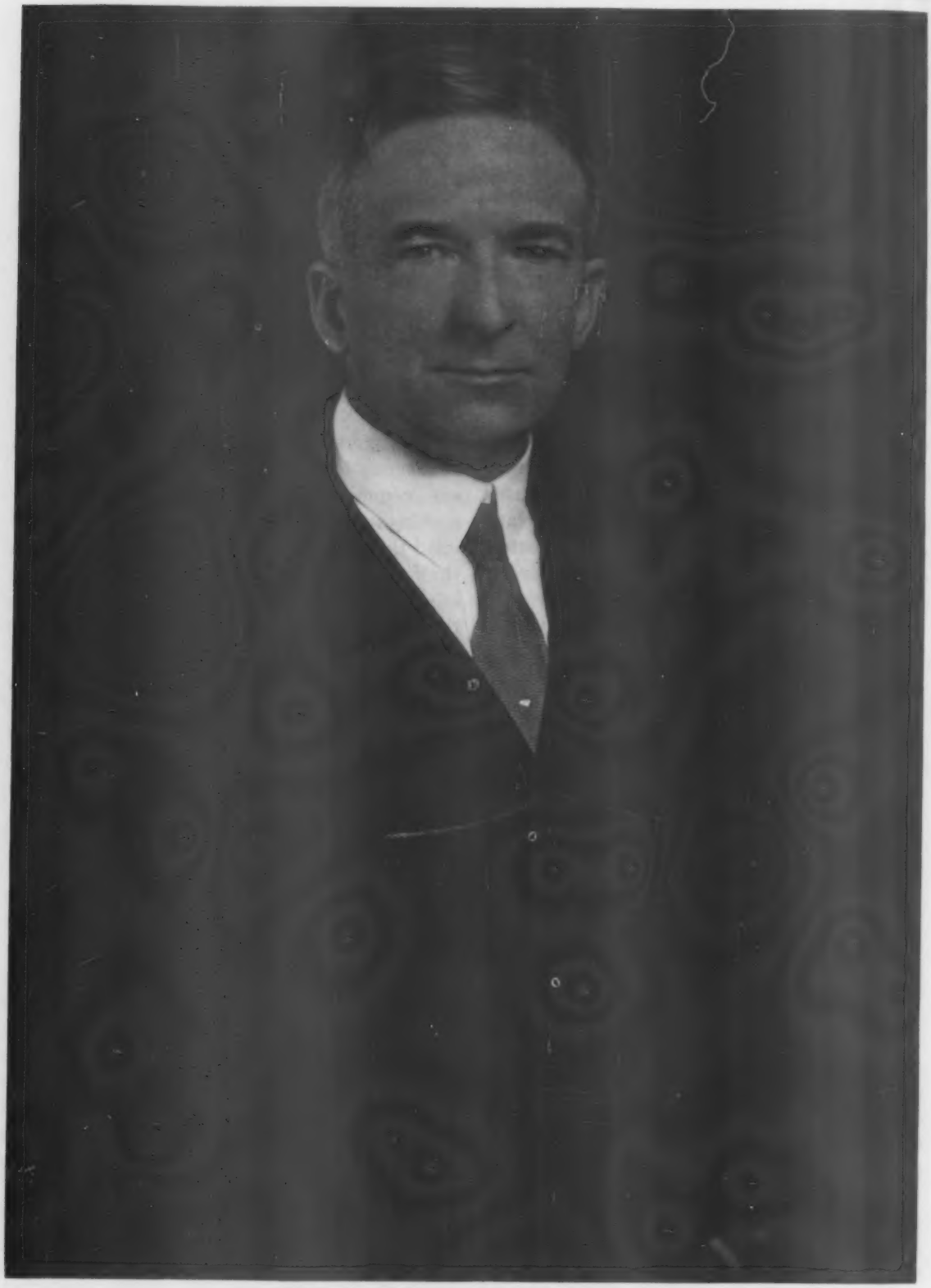
We doubt if anyone will read the record of the Kansas City meeting without realizing that first-class thinking is being devoted, under Association auspices, to the problems of the profession and the public. Sustained and disinterested thinking by lawyers upon these subjects is not new; it has been characteristic of the profession for years. Its mobilization and coordination through a representative House of Delegates is new, and offers great potentialities for public good.

Unless the Association is to reject these added opportunities, the work of its Sections and Committees must be further implemented and coordinated. The quality and quantity of counsel and assistance expected from the Association, in not a few of these public matters, go beyond what individual lawyers can be expected to give, from their own time and means. Collective action by the profession in the public interest must be supported and implemented to such extent that it compares favorably with what is proffered as collective action by governmental staffs. Mrs. Rutherford suggests: "One of the most effective means of creating a favorable public opinion is through the performance of a necessary public service. 'If thou doest well, shalt thou not be accepted?' *Genesis* 4:7."

From the long range point of view as to what the profession can and should do for the public, the Assembly and House of Delegates amended the By-laws of the Association so as to empower the Board of Governors to establish voluntary "sustaining memberships" in the Association. This power has been exercised, and such memberships are available, to those members who are willing to help in this way. The Association has not thereby created *classes* of memberships. All of its members remain annual (or life) members, and pay the same dues. Any member may become also a sustaining member for a year, and remain such member as long thereafter as he wishes, without commitment to continue. "Sustaining members shall have no rights or privileges beyond those of other members, and their names shall not be published in a separate list, or otherwise identified, in the Annual Report of the Association."

Those who are willing to help sustain a greater usefulness for the Association may do so, but they gain for themselves no preferences or privileges beyond that of helping their Association. The whole project is on the most democratic basis, in that such payments are wholly optional and are in equal amount ($25 a year), with no sustaining member paying more than any other. Such a method of enabling the Association to undertake such work as its own members will support, seemed preferable to dependence on contributions in unequal amounts, from members or outside institutions.

Basically, the Association is made up of its annual members, and is wholly controlled by them and their elected representatives. Primarily, the Association needs a more inclusive membership; and its friends will do all they can to bring that about. At the same time, many present members of the Association will be glad to help sustain and broaden its work, by becoming sustaining members on the basis adopted in Kansas City.



HON. ARTHUR T. VANDERBILT
President of the American Bar Association, 1937-38

THE PRESIDENT OF THE AMERICAN BAR ASSOCIATION—ARTHUR T. VANDERBILT

IN electing Arthur T. Vanderbilt of New Jersey to serve as its President until the adjournment of the Cleveland meeting next July, the Association chose an executive richly experienced in its work, a lawyer who ranks high among the active practitioners of his State, and a forward-looking leader who has devoted himself earnestly to many projects in the public interest. Although at the age of forty-nine he is one of the youngest Presidents in the Association's history, his friends are confident that his many-sided experience and interests in the work of the profession of law qualify him admirably to carry forward the administrative duties of his office and to advocate effectively the policies of the Association as determined by its membership, directly or through the House of Delegates.

Mr. Vanderbilt has been active and influential among those lawyers who, during the past few years, have given freely of their time to practical efforts to improve further the administration of justice and to strengthen the organization of the Bar, in the States and the Nation. Busily engaged in the general practice of his profession, he has not hesitated to enlist his ability and experience from time to time in the defense of those whom he believed to be accused unjustly, on charges in derogation of the rights of men to organize, assemble, speak their views, and assert peaceably their rights. In several public capacities, he has served his State and County, in the interests of better government.

His was the distinction of being the first member of the American Bar Association to be nominated as its President under open methods provided by the new Constitution of the Association. His unanimous nomination by the State Delegates was made and announced last January. During the subsequent months, no other nomination was made by the members of the Association, as could have been done if there were doubt of the propriety of his election. The Kansas City meeting at the end of September found him unopposed. Upon his unanimous election, he was able to devote himself immediately to the duties of the office; and his friends predict for the Association a year of notable achievement under his guidance. Essentially he believes that the future of the organized Bar is a matter of self-determination, and that the American Bar Association can do and be whatever its members wish it to do and be and are willing to devote time, thought, and energy to helping it to do and be. Recognizing that the great volume of executive work of the Association is carried on by its elected officers and Board of Governors and that the President of the Association necessarily is recognized as an exponent of its declared policies, Mr. Vanderbilt believes strongly that the policies and objectives thus advocated should be those determined by the membership, in accordance with the democratic procedures provided by the Constitution of the Association, and that the future of the Association rests truly with its members.

He was born in Newark on July 7, 1888, the first child of Lewis and Alice (Leach) Vanderbilt, who had lived in Newark for many years. On September 12, 1914, he married Miss Florence Althen, also of Newark. They have five children—three girls and twin boys, and their home is in Short Hills, within Essex County, in which he has lived all his life. Their summer home is on the coast of Maine.

Mr. Vanderbilt attended the public schools of Newark, and in 1906 entered Wesleyan University at Middletown, Connecticut, from which he received the degree of Bachelor of Arts upon graduation in 1910 and the degree of Master of Arts two years later. He was graduated from Columbia University Law School in 1913, with the degree of Bachelor of Laws, having taught meanwhile in the Newark Central Evening High School.

After serving his law clerkship in the offices of the firm of Sommer, Colby & Whiting, and the late Jerome T. Congleton, former Mayor of Newark, Mr. Vanderbilt was admitted to the Bar of New Jersey in 1913, and opened his own office in Newark the following year. In 1914, he was also appointed an instructor in the New York University Law School, in which he became a full professor four years later, and has served the school in that capacity ever since For many years he taught contracts and equity, but lately has specialized in insurance, administrative law, and trusts. He is recognized as an authority on the theory and practice of judicial administration.

From the time he began the practice of law, he showed a preference for the trial of cases in court and the argument of appeals, in general practice. He has been recognized for many years as one of the outstanding trial and appellate lawyers in his State. He was New Jersey counsel for the Port of New York Authority in 1926, and is a director and counsel for several well-known financial institutions.

With an enlightened and progressive view of the lawyer's duty to protect the rights of individuals against the encroachments of arbitrary power in public or private hands, Mr. Vanderbilt has shown that he believes firmly in the maintenance of personal and civil liberties and has given freely of his services to defend these rights in the Courts, when they seemed to him to be in danger. In the great Passaic textile strike in

1926, he represented the United Front Committee in connection with the hearings on the injunctions issued out of the Court of Chancery. Soon afterwards, when Roger N. Baldwin, Secretary of the American Civil Liberties Union, and others, had been convicted of unlawful assembly, and their conviction had been affirmed in the Supreme Court of New Jersey, he argued their appeal before the New Jersey Court of Errors and Appeals. In setting aside their conviction, the Court handed down what has been regarded as the leading case on unlawful assembly. A year or so ago, when the employees of one of the Newark newspapers were on strike, he appeared on behalf of the Newspaper Guild in the Court of Chancery. When the government of his native County of Essex fell into ill repute in 1919, Mr. Vanderbilt organized and led the movement to end the mal-administration and has been largely responsible for giving to Essex County, the most populous in the State, a notably efficient administration ever since. In fulfillment of that civic responsibility, he has served as Essex County Counsel since 1922.

Mr. Vanderbilt is a member of the American Law Institute and the American Judicature Society, is a Trustee of his Alma Mater—Wesleyan University, and a member of the honorary society of Phi Beta Kappa, and of Delta Kappa Epsilon, Phi Delta Phi and Delta Sigma Rho fraternities. He is also a member of the Academy of Political Science, the American Academy of Political and Social Sciences and of the American Political Science Association.

Keenly interested in the practical improvement of judicial administration, he has been Chairman of the New Jersey Judicial Council since its creation by Act of the legislature in 1929. Largely through the efforts of the Judicial Council, many improvements have been brought about in the Courts of the State, with the result that civil cases are now reached for trial within six months instead of three years, appeals are disposed of more rapidly, and the heavy burden on the judges of the appellate Courts has been measurably lessened. Criminal law enforcement has been scientifically surveyed; and numerous statutes have been enacted, and others proposed, for the further improvement of the administration of justice. Comprehensive constitutional changes have been prepared and recommended to the Legislature, for the purpose of further modernizing the judicial machinery of the State. His leadership in this field has received National recognition through his election for four successive years as Chairman of the National Conference of Judicial Councils. If he has his way, the organized Bar will plan and lead the way to further improvements in the administration of justice and will re-establish the reign of justice according to law in the discharge of quasi-judicial duties by administrative tribunals.

Long active in the Bar organization of his State, he has served on the Board of Trustees of the New Jersey State Bar Association, and as its third, second and first vice president. He declined promotion to the presidency of the State Association this year because of his prospective duties in the American Bar Association. He led the movement to coordinate the activities of the local Bar Associations into the General Council of the State Association. Vitally concerned with the problems confronting the younger members of the Bar, he sponsored the Junior Bar Conference in New Jersey, and enthusiastically lends his support to its efforts. He has strongly favored the early integration of the Bar of his State, and this movement has recently been approved by the General Council of the New Jersey State Bar Association.

Mr. Vanderbilt's election as President of the American Bar Association is not merely a recognition of his attainments in his profession or of his many services to the organized Bar. At the age of forty-nine, he turns aside from the daily demands of a busy practice as a barrister, not because of the honor and compliment of the choice, but because he feels that there is an opportunity this year to advance further, through the American Bar Association, the many interests of the public and the profession. He has been the New Jersey member of the former General Council of the Association, served as Chairman of the Insurance Law Committee, was the first Chairman of the Insurance Law Section, has been active in the deliberations of the Conference of Bar Delegates and the Section of Legal Education, served three years as a member of the Executive Committee and Board of Governors, and has just retired from the responsible duties of the Chairmanship of the Budget Committee. He thus brings with him to his new post of leadership not only a genuine enthusiasm and a great capacity for hard work, but also a broad and thorough knowledge, gained at first hand, as to work and the problems of the Association, which will be invaluable to the Association and the profession during the year.

W. Wallace Fry Elected President of Missouri Bar Association

W. Wallace Fry of Mexico, Missouri, a member of the state board of law examiners, was elected president of the Missouri Bar Association for 1938 at the annual meeting of that association at the Municipal Auditorium in Kansas City, on Friday, October 1st. He succeeded Kenneth Teasdale of St. Louis.

The Missouri Bar Association this year held a one day session on the final day of the American Bar Convention. Other officers elected at the meeting were James A. Potter, Jefferson City, secretary, and Paul A. Buzard, Kansas City, treasurer, and the following vice-presidents: Julius Drucker, St. Louis, District No. 1; R. L. Motley, Bowling Green, District No. 2; Grover C. James, Joplin, District No. 7, and Arthur Allen, Springfield, District No. 8.

THE BAR AND THE PUBLIC

Fundamental Proposition on Which Bar Association Work Is Based Is That Those Measures Which Are for the Best Interest of the Public Are for the Best Interest of the Bar—Activities of the American Bar Association Measured by This Standard—Services of the House of Delegates—Policing the Profession—Improving the Administration of Justice—Pressing Problems and Fundamental Issues—Grave Problem Presented by Administrative Tribunals — Can and Will the Bar Act?*

By Arthur T. Vanderbilt
President of the American Bar Association, 1937-38

ALL one can do on an occasion such as this is to indicate a point of view with respect to Bar Association work. If we are to enlarge our sphere of influence our thoughts should be focused, it seems to me, not on those who attend our annual meetings and do so much to make them a success—as this one most decidedly has been, far beyond our expectations—but on those members who do not attend, yes, on those lawyers who are not yet members of the Association, and beyond them, on the public at large.

Public Interest Foremost

I emphasize the public at large, for the fundamental proposition on which all Bar Association work is premised is, I take it, that any measure that is not for the best interest of the public is not for the best interest of the Bar, or, to state it affirmatively, those measures which are for the best interest of the public are for the best interest of the Bar. This fundamental proposition, I submit, is not debatable in any bar association. To question it, to seek to put the interest of the Bar above the interest of the public, is to reduce ourselves from the high level of a profession, to the grade of a trade or occupation. More than that, it would be selling our birthright for less than a mess of pottage. It would mean self destruction. Just as the standing of the individual lawyer is dependent on his good reputation, so is the standing of the American Bar Association dependent on its good reputation with the public. And how shall we maintain our good reputation with the public save by putting the public interest foremost?

Services of House of Delegates

Let us measure the American Bar Association by this standard. I cannot here review the entire record. A formidable volume has just been published covering that field. All I can do is to point briefly to our most important activities.

First of all, let me refer to the work of the House of Delegates representing, under our constitution and by-laws, the legal profession of the United States. Its members speak not only for the forty-eight state bar associations and the larger local associations, but also for other affiliated legal bodies such as the American Law Institute, the American Judicature Society, the Association of American Law schools and the National Association of Attorneys General. The Attorney General and the Solicitor General of the United States are on its roster. Both participated last year in our deliberations at Boston, and again this year we are honored by the presence and cooperation of the Solicitor General.

The House of Delegates is a deliberative body, and many who have watched it function have expressed the opinion that it constitutes a worthy model of what a deliberative body should be. It is truly an impressive sight to watch the members of the House working hour after hour at their desks, debating on a high plane, with their thoughts focused on the public interest, the important issues confronting the bar today.

And yet, we must constantly remember that its proceedings, its votes, its resolutions, carry with them no legislative authority. Its fiat binds none outside our profession. It has no public enforcing power. It has no purse to coax compliance. Its will is dependent for its execution solely on the force of the public opinion it reflects or generates. Others may speak by reason of the authority of power; we may hope to speak effectively only by the authority of reason and fidelity to the principles of justice and law. And yet in spite of these inherent limitations, who can doubt that the course of American history in the year 1937 has been significantly changed by causes not the least of which were the instrumentalities provided by our constitution and by-laws adopted at Boston last year?

Policing the Profession

Let us survey another field. Years ago the American Bar Association began, within the limits of its power, to police the profession. Through its Section of Legal Education and Admissions to the Bar it has prescribed standards of legal education and established a list of accepted law schools to the end that the oncoming generation of lawyers may be more adequately prepared to serve the public. It has defined canons of professional conduct and through its Committee on Professional Ethics and Grievances, it gives opinions in specific cases concerning judges and lawyers, to the end that the unworthy may be eliminated from the profession in the public interest. Through its Committee on Unauthorized Practice of the Law it endeavors to pre-

*Address at the Fifth Session of the Assembly on Oct. 1.

vent non-lawyers, who have not, of course, complied with its standards and who are not bound by its canons of professional ethics, from preying on the public.

Here again we must always remember that not a single one of these agencies has any enforcible legislative, executive or judicial authority except over our own members. Our policeman, if such he may be called, carries no gun. Rather has he been guide, philosopher and friend. The changes wrought in these fields are eloquent testimony to careful, painstaking lawyer-like work in the interest of the public and acceptable to the public.

State after state has accepted our standards of legal education. Our canons of judicial and legal ethics have come to have the force of law throughout the country. The advice of our committee is constantly sought on a nation-wide scale on questions of unauthorized practice. In all of these fields much has been done, though much, of course, remains to be done, and in an era of rapidly changing conditions always will remain to be done. All this, moreover, has been accomplished by the single process of appeal to reason. I stress these points, by way of answer, to those who, without reason, expect the American Bar Association in a day to cure all the diseases of the body politic.

Improving the Administration of Justice

Time will not permit me to speak of the work of our many Committees and Sections. Many of them are doing effective work. I desire to dwell for a brief moment on one phase of our activities where we must press on more vigorously. We must lead in the work of improving the administration of justice. Not that we have not played our part in the past. I am not unmindful of the work of the Conference of Commissioners on Uniform State Laws. I have not forgotten the crusade carried on singlehanded by the late Thomas W. Shelton of Virginia for over a quarter of a century, as chairman of a committee of this Association, to provide uniform rules at law in the Federal Courts—a crusade ended happily two years ago by the cooperation of the Attorney General in urging on the Congress the enactment of appropriate legislation. Many other instances might be cited. Yet the fact remains that the administration of justice, in this country as a system, has not kept pace with the needs of the times, and when we consider the pace of change in the last fifty years, should we wonder that this is so?

Pressing Problems

There is hardly a Section or Committee that is not confronted with these problems. With an accident occurring every three seconds, with 110,000 killed and 400,000 maimed in 1936, more than in most of our wars, is it not in order to say that the studies of the Insurance Law Section in this field must go forward to completion and that the Section of Criminal Law should cooperate in this work?

With hundreds of millions of dollars of municipal bonds owned largely by fiduciaries, in default during the depression, and with no adequate way of resolving the conflicting views of bondholder and municipality, save by what a distinguished practitioner in this field has aptly termed, "trial by battle," is it not in order to suggest to the Section of Municipal Law, the Section of Judicial Administration, and the Standing Committee on Jurisprudence and Law Reform, that they combine their resources in an effort to effect a solution?

With one of the foremost experts in the country on criminal law telling us that crime costs the country $15,000,000,000 a year, can we afford longer to say complacently, "But I do not practice Criminal Law; in fact I know nothing about it"? Have you ever inquired in your jurisdiction as to what percentage of criminal complaints results in apprehensions, what percentage of apprehensions results in *nolle prosse* or in trial, what percentage of trials results in convictions, what percentage of convictions results in reversals, and, finally and most important of all, what proportion of sentences results in paroles or pardons?

If every lawyer in the United States would answer these questions for himself, there would be a renaissance of interest in the enforcement of the criminal law and in the work of our Section of Criminal Law. Everyone knows the progress that has been made in this field since the day when a former President of this Association, who was also President of the United States, and later Chief Justice, declared that the enforcement of the criminal law in the United States was a disgrace to a civilized country, but everyone of us must likewise face as a fact today the widespread failure in many aspects of the enforcement of the criminal law.

Fundamental Issues

But these are but simple problems compared with some of the more fundamental issues in the administration of justice. Can there be justice where the judges are dominated politically? What of judicial selection? In some states the problem is acute. No one method of judicial selection has proved to be perfect. The ultimate answer depends upon an enlightened public intelligence and a militant bar, but while we are awaiting that millennium, much study must be given to methods of judicial selection.

And while judges and lawyers have debated in formal sessions the problems of judicial selection, many of us who make our living trying cases day after day have debated in informal conferences the difficulties of jury selection. From the standpoint of the client and of the public, it is just as important to obtain a competent jury, representing generally a cross-section of the honest common-sense of the community, as it is to have a competent and honest judge. In how many communities, especially in our cities, can we say that we have such juries? Lacking them, can we have justice? And how often have we discussed the necessity of having some supervision of judicial work, not from either of the other two coordinate departments, but from within the judicial system, to give us, among other things, some relief from the judge, whom we occasionally meet, who is so busy deciding which case he will decide that he never decides any? Can you imagine any other activity or institution in which there is the decentralized organization and lack of responsibility that there is in the average judicial system in the United States? These, I submit, are matters with reference to which the public expects the Bar to blaze the trail. The Bar in England refused to do it a hundred years or more ago, with the result that laymen took over the task. We must accept

the challenge, difficult, arduous and burdensome though it be, if we are to be faithful to our trust.

Cooperation with American Judicature Society

At this point it is a genuine pleasure to make an announcement of interest to every member of the Association. For twenty years the American Judicature Society has been in the forefront of every movement in this country for improving the administration of justice, and for bettering the affairs of the Bar. It has had as its distinguished Presidents, Senator Root, President and Chief Justice Taft, Chief Justice Hughes, and Secretary Newton D. Baker. During all this period, Mr. Herbert Harley has carried on the work of the Society through its journal with remarkable foresight, journalistic skill and single-hearted devotion. By arrangements just consummated by our Board of Governors with the Judicature Society, its Journal will be furnished without any additional charge, to each of our members for a year. The significance of this arrangement for the cause of judicial administration cannot be overestimated.

Our Paramount Problem—The Administrative Tribunals

There is one more problem—to my mind the most important of all—that we of the Bar must face. I refer to the unparalleled growth of our administrative tribunals and the executive justice administered by them. The problem is utterly without partisanship. The agencies have spread whichever party is in power in the states as well as in the nation. The problem is not peculiar to us; it is shared by all common-law countries.

These administrative agencies, in our increasingly complicated civilization, have been called upon to take over problems which the legislatures have neither the time, the knowledge, nor the technical skill to handle. They were experimental in their origin. In some of them, counsel drafts rules and regulations for his commission, directs an investigation, files a complaint in the language of an outraged plaintiff, presents evidence to the commission to support the complaint, writes the opinion of the commission sustaining the complaint of his outraged plaintiff in judicial language adapted to the pertinent decisions of the court of last resort, and in event of appeal, moves heaven and earth to prevent a review of the facts.

I am not discussing any mere theory of the separation of powers. I am concerned with one body making the rules of the game, playing the game as one of the teams and acting as umpire at the same time, and then writing up the newspaper reports. I am concerned that the umpire, who really is a judge doing judicial work, no matter what his title may be, should have a short term and often no tenure of office and be obliged to live in a political atmosphere. I am concerned because he tries issues of far reaching importance, many of which are of more moment than those tried by our ordinary judges in our traditional courts. I am concerned because I cannot obtain the same review of his decisions as I can from that of an equity or admiralty judge. I cannot see why the finding of fact of a trained equity or admiralty judge should be subject to complete review, as the experience of centuries has shown is essential and indispensable, while the findings of fact of the commissioner, who is often without legal training, in cases far more complicated than ordinary equity or admiralty suits, is subject to a far less rigid review. To quote our distinguished former president, Chief Justice Hughes:

> "The power of administrative bodies to make findings of fact which may be treated as conclusive, if there is evidence both ways, is a power of enormous consequence. An unscrupulous administrator might be tempted to say 'let me find the facts for the people of my country, and I care little who lays down the general principles.'"

Finally, I am concerned that, while it is conceded that the growth of administrative law is the outstanding legal phenomenon of the twentieth century—some authorities even say more decisions are being made by administrative tribunals than by the ordinary courts—only fifty-five of the ninety-four law schools approved by the American Bar Association offer any courses at all in administrative law and where they do offer courses, most of them are one-hour courses and most of them are optional. The conclusion seems inescapable that most of our students are leaving their law school without any adequate grasp of the outstanding legal phenomenon of the twentieth century.

I am, of course, not suggesting that our administrative tribunals be abolished—they are indispensable in our stage of civilization. But I am intimating that the time has come to survey our experience and ascertain to what extent it may be possible to provide in our administrative tribunals the safeguards of private rights, both as to person and as to property that our traditional courts afford without any undue loss of executive efficiency. Here, I assert, are problems that challenge the best efforts of the Bar and which will not wait indefinitely for a solution.

These issues are much the same as were involved in the development of equity four centuries ago. The chancellor was originally an administrative official quite free from the rules of law. His processes were purely administrative. But by the very necessity of doing justice, processes originally administrative became judicial. Much the same transition would now be taking place were it not for two facts: first, our administrative tribunals, being creatures of the legislature, cannot mold themselves to suit changing conditions confronting them as the chancellor could and did; second, the problems of these administrative tribunals are so diverse and so complicated that no one man can solve them. The solution must be the joint work of public administrators, judges, lawyers, and law professors working in full cooperation. They must put all their energy into the task. They must keep the public interest forever in mind; and their energy must generate, not heat, but light.

Can and Will the Bar Act?

Can the Bar solve these problems? The only answer I can make is that in the past it has risen to every responsibility it assumed in the public interest. To my mind there are many vital substantive issues on which the Bar should be taking its stand, because of our peculiar knowledge and experience, but as to which we are virtually precluded by the consciousness that the public will say we have no right to speak until we master the judicial and administrative processes, until we have put our own house in order.

Will the Bar meet these pressing problems? If its recent resounding proclamation of allegiance to

the principle of the independence of the judiciary was anything more than an emotional reaction to a crisis, if it meant that we really believe in the independence of the judiciary, it will. From the lowest court in the land to the highest, from the most obscure administrative tribunal to the most exalted, we must see to it that the judges in the judicial department and in the coordinate administrative branch are so situated that they may work independently and effectively. Then and then only can we reasonably have justice that will command public respect. In many states this will mean taking off the trial judge the fetters which have reduced him to the ignominious role of umpire. In every state and in the federal government, it will mean the overhauling and reorganization of the administrative process of adjudication.

Again I ask, *will* the Bar tackle this herculean task? It will, if it can be induced to turn away from the swarm of petty problems we are attempting to meet, and to look at black shadows resting over many countries in four other continents—countries in which law has been replaced by despotism, where liberty, without which the spirit of man cannot survive, has perforce been banished, where courts, so-called, are in bondage, where law is one man's or one clique's whim, and where the Bar is debased or exiled.

That shadow can never grow here. The spirit that answered the tyranny of colonial governors, that wrote the Declaration of Independence, that cautiously framed the Articles of Confederation, that in due time forged the structure of the Constitution, and that, as our frontier moved West, decade after decade, carried with it the doctrine of liberty under law, can and will in these times, when we no longer have a frontier, solve these paramount problems of judicial and administrative justice in a commercial and industrial era. We will solve them, because our duty to our profession and public opinion alike demands that we start to solve them and to solve them now.

SENATOR BURKE'S ADDRESS AT ASSOCIATION DINNER

The Forces Which Have Deliberately Set about to Despoil the Federal Judiciary, to Lower Its Prestige in the Eyes of the People, and to Strip It of Its Constitutional Functions, Are not Yet in Complete Rout—Broken Lines Have Been Reformed and What They Hope Will Be a More Effective Strategy Has Been Developed—The Constitution as a "Layman's Document"—The Alleged "Veto Power" of the Courts—Judicial Review*

IT is a matter of deep regret to me that my colleague, Senator Wheeler, found it necessary a few days ago to withdraw from his scheduled appearance on this program tonight. My concern is due in part to the fact that I am required to substitute for him, but more particularly because it deprives you of the opportunity to hear a real message from a great American. Some here present, Mr. Stinchfield, Sylvester Smith, and others, were in a position to know first-hand, the monumental character of the task so ably performed by Senator Wheeler during the recent session of Congress. For these men from your ranks were in the heat of the battle themselves in that epic struggle which the President of the United States delights in referring to as *"judiciary rejuvenation,"* but which the overwhelming majority of the lawyers of the country knew to be plain *"judiciary repudiation."*

My main reason for consenting to appear before you this evening is that I may add an additional word of warning. It is this. The forces that have deliberately set about to despoil the federal judiciary, to lower its prestige in the eyes of the people, to besmirch its membership, and to strip it of its constitutional functions, are not yet in complete rout. It is true that they suffered, in their first open assault, a major set-back. Quickly they have re-formed their broken lines, and have developed what they hope will be a more effective strategy. Sharp-shooters have been posted at every point of advantage with instructions to show no mercy. It may be that when the next engagement is on, some of the leaders in the former fight will be missing. There is on hand a plentiful supply of poison gas ready for use.

When the President talks, as he has recently, of a "virtual conspiracy" in which the ablest lawyers of the country are charged as participants, a conspiracy to defeat the ends of justice and prevent the underprivileged from securing the benefits of social and economic reform, it is not that he has any grievance against lawyers as such. Why, I understand that he is a sort of a lawyer himself. When he solemnly assures the nation, as he did less than two weeks ago, that in the drafting of the Constitution setting up the new republic with guaranteed rights to the individual and strict limitations on all governing agencies, the lawyers of that day played a minor role, it is time to look behind the words and see the purpose that is in mind. When he goes on to say, as he does at length in that same speech, that in every period in the hundred and fifty years that have elapsed since the Constitution was formulated it was the lawyers of the country who took all the leading roles in the effort to subvert the Constitution and

*Address delivered at the Annual Dinner of the Association, at Kansas City, on the evening of Thursday, Sept. 30.

use it to defeat the people's will, we need inquire no further as to the reason for this line of attack. It is now thought necessary, in preparation for the new assault, to lay a mine under the chief shock troops that successfully resisted the late unlamented attack. If the country can be sufficiently prejudiced against lawyers, some of their effectiveness as defenders of the Court will be removed.

I venture the suggestion that if the lawyers of the United States had been willing to join in the hue and cry against the Supreme Court, you would hear no talk today about the Constitution being a "layman's document" and lawyers in general being such a bad lot. This Association committed a strategic error when it took a poll of its members and of the bar of the country and disclosed a real "mandate" in favor of the preservation at all hazards of the integrity and the independence of the judiciary. It was an error, that is to say, if lawyers happen to prefer a mess of pottage to their birthright. You offended in the same way with every effort that you put forth to lay the facts before the people, and warn the country of the deadly danger that confronted one of its most cherished institutions. The present tirade against lawyers is on a par with the tactics of the occasional police court practitioner expressed by the motto: "The weaker your case, the more abusive you must be toward the opposing counsel." Lawyers have taken too aggressive a part in defeating the attempted application of force to the judiciary to expect to escape without having their services attacked, their motives questioned, their characters impunged.

HON. EDWARD BURKE

Make no mistake on this point. There is a direct connection between the present demagogic attempt to belittle the legal profession, and the well considered and invaluable services of members of the profession in helping to defeat the most ruthless attack in recent times by one department upon the independence of a coordinate branch of the government. You may be sure of this also. If you persist in your "evil way" you would better fortify yourself against the shafts of ridicule, of contumely, and of every other weapon that may be thought useful in breaking down your resistance. There was a time when the banker was the favorite "whipping boy". The welts of the lash upon the back of the banker may now be permitted to heal, while the lawyer takes his place with bared back at the post.

Is it true, as charged, that whatever merit the Constitution may have is due to the alleged fact that men trained in the law were not permitted to have much to do with its drafting? Let us see. There were fifty-five delegates selected to sit in the Constitutional Convention, but less than forty attended to the end. Of the total number thirty-three were lawyers. I would challenge any fair-minded person to make up a list of the ten members whom he may think chiefly responsible for the final form which the Constitution took, without finding that at least seven or eight of them were lawyers. You would have to include Randolph, Pinckney and Rutledge. You could not well omit Gouverneur Morris, Olliver Ellsworth, or Roger Sherman. And then there was James Wilson and Rufus King. A "layman's document"? Why every student knows that in its final form the Constitution came from the Committee on Style, and that four of the five members of that Committee were able lawyers. In fact, chief credit for authorship belongs to Gouverneur Morris, one of the most noted lawyers of the day. If you are inclined to rejoice with the President at the absence of, and I quote—" 'whereases' and the 'parties of the first part' and the fine print which lawyers put into leases and insurance policies and installment agreements"—just remember that the President would never have indulged in this unworthy attack upon a noble profession had he not been suffering from a richly deserved defeat in which lawyers, in and out of Congress, played a prominent part.

I like to think of our Constitution not as a *"layman's document,"* not as a *"lawyer's contract,"* not with any class or group title appended, but as the final expression in words of the consummation of the hopes, the aspirations, and the determination of freedom-loving people of every age for the establishment of a government *of law and not of men.* Nor does one need to be trained in the law to read understandingly the Constitution, Madison's Notes, the Federalist Papers, and reach a sure conclusion that the framers of the Constitution, lawyers and laymen alike, realized full well that the liberties of the people would not be secure unless there were established and maintained three independent departments; executive, legislative and judicial, "each master in its own house and scrupulously refraining from interference in the house of another." They were willing to compromise on other matters, on slavery, on the conflicting interests of large and small states, on the method of choosing the chief executive. But they would not yield, not one inch, on the division of power between three independent departments.

There is much that is appealing in this talk of

cooperation. Within certain limitations, it is a sound and helpful doctrine. But carried to the extent now advocated it would mean the end of our form of government. If Congress passes an Act which the President considers bad for the country, must the Executive cooperate with the Legislative and give his approval? Not if he is to be true to his oath of office. The present Chief Executive has freely exercised the veto power, which is the negation of cooperation. I think he has rendered a great service in doing so. Only once,—and I think that in this respect at least I may be the most loyal supporter the President has in either House of Congress,—only once, have I voted to override his veto.

If the President recommends a piece of legislation which a majority in Congress considers unwise, must Congress, notwithstanding, cooperate and put the proposal upon the statute books? Certainly not. To the everlasting glory of the First Session of the Seventy-Fifth Congress, it has shown a determination to perform its duty as a coordinate and independent branch of the Government. If the President is half as wise as I give him credit for being, he is even now giving full heed to the fact that, since the emergency is largely at an end, Congress is on the verge of functioning again as *the* legislative department.

Finally, if Congress and the Executive agree upon a measure, and in due time a litigant appearing before the Supreme Court takes his stand upon some provision of the Constitution, must the Supreme Court apply this doctrine of cooperation, and put the citizen in jail or deprive him of his property although a majority, or perhaps all of the members of the Court, are convinced beyond a reasonable doubt that the statute in question violates the deliberate will of the people as written in their Constitution? That is in effect the complaint that has been lodged against the Court,—that it has refused to shut its eyes on the Constitution and consider only the statute or the executive act.

This brings me to two points which I must discuss briefly in reference to the power of the Supreme Court to void statutes and executive acts when successfully challenged on constitutional grounds. In his Constitution Day address, after calling attention to the fact that that document does not, in so many words, give to the Supreme Court the power to declare legislation unconstitutional, the President used this language:—

"Again and again the convention voted down proposals to give justices of the court a veto over legislation."

The plain inference to be drawn from that language, in the connection in which it was used, could only be that the framers of the Constitution deliberately denied to the Court the power to pronounce the supremacy of the Constitution when a statute came into conflict with any of its provisions. If that were true, it would necessarily follow that the Supreme Court has usurped this power and is using it to defeat the people's will as enacted into law by their chosen representatives. If there were any other inference that could be drawn from the President's language, he should be given the benefit of the doubt, because this is a serious charge that he makes against the Court. As it happens, we do not need to rely upon inference at all. In a radio address on March 4, 1937, in a futile attempt to justify his month-old proposal to apply force to the judiciary to make it decide always in accordance with the will of the executive, after discussing the Administration efforts to make effective legislation for the relief of agriculture, and again for the benefit of labor, the President twice used, with significant emphasis, this language:—

"You know *who assumed the power to veto*, and did veto that program."

There is not the slightest justification for the President to make the assertion that the power which the Supreme Court exercised in the AAA and NRA cases was that which the convention voted "again and again" not to vest in the justices of the Court. If he has not had the time to study the matter himself, his many legal advisers surely should set his thinking straight on this point. The facts are clear. It *was* seriously urged in the convention that there should be a double check on the wisdom of legislation. It was proposed that the Supreme Court should be joined with the Executive in the exercise of the veto power. In other words, this suggestion was that before an act of Congress could become law it must meet the approval not only of the President, but of the Supreme Court as well. If either doubted the wisdom of the legislation, the veto would stand, and the law would never go into effect. Four times the convention voted down this proposition. One reason was that the veto power, dealing with the wisdom of legislation, is not a *judicial function* and, therefore, could not properly be lodged in the court. The controlling reason for the refusal to give the court the veto power was that the court *already had the power to void legislation which was contrary to the Constitution*, and it was thought unwise to give the court this double check. The court has never claimed to have the veto power. It has asserted time without number that it has nothing to do with the question of the wisdom or propriety of legislation. That is for the Congress and the President solely to decide. To keep on asserting that the court has assumed the veto power, when the entire history of the court belies the statement; to keep on intimating that the action of the convention in refusing to vest the power of veto in the court is the same thing as if the convention had denied the power of judicial review, is to fly in the face of the facts, and can serve no purpose other than to confuse the issue.

We come finally to this question of judicial review. As I look into the future it seems to me clear that it is around this question that the next court battle will rage. There is a considerable sentiment in favor of now doing away with the doctrine of judicial review. If that were done, then any statute passed by Congress would at once become effective even though clearly contrary to constitutional provisions. We would have complete legislative and executive supremacy. The only recourse for anyone who claimed that his liberty or his property had been unjustly taken from him would be to try to get the people to change the legislature and to elect a new president. A plausible argument can be made in favor of the denial of judicial review. We should first pause for a moment to consider by what authority the court has claimed this power for the past one hundred and fifty years.

The President says:

"Contrary to the belief of many Americans, the Constitution says nothing about any power of the court to declare legislation unconstitutional."

It is true that nowhere in the Constitution will you find in so many specific and exact words the grant of this power. The same is true of a vast number of other powers the exercise of which is necessarily im-

plied from the language used. The Constitution nowhere grants to Congress the power to fix the number of judges on the court. But it is correctly implied that Congress does have that power. The only point in dispute on that question during the recent controversy was whether that power could be held to include the right to add members to influence the decisions of the court, or whether it was limited to maintaining the court at such a number as would enable it to promptly and efficiently handle the work that comes before it.

These facts should be kept in mind. The framers of the Constitution, all of them, were thoroughly familiar with the doctrine of judicial review. They knew that nearly two hundred years before they met in Philadelphia, Sir Edward Coke, Chief Justice, had declared:

"An act of Parliament contrary to Magna Charter is null and void."

They knew that under the colonial charters any legislation must be invalidated if found by the high court to be in violation of English law. When they wrote:

"This Constitution and the laws of the United States *which shall be made in pursuance thereof* . . . shall be the supreme law of the land . . ."; they believed they were clearly stating the doctrine of judicial review.

When the Constitution was submitted for ratification, it was clearly understood in every one of the thirteen states that vesting *"the judicial power"* in one supreme court, without limitation, carried with it by necessary implication, the power of judicial review. There was no concealment. The Federalist was in general circulation and clearly developed the point, as in these words:—

"Limitations of this kind can be preserved in practice in no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void."

Other provisions in the Constitution clearly indicate that it was the understanding that the Supreme Court should see to it that only such federal statutes and such state constitutions and legislative enactments as should be made in pursuance of the Constitution should be permitted to stand. There has been general support and approval of this course. If we are now to fight the matter all over again, it will at least be an open contest with the real aims not hidden from view and covered over as they were in the last proposal. We will not need to waste any time on congestion in the courts, delays, the influence of age, divided opinions, or any of the other matters used to sugar coat the bill proposed on the 5th of last February. The lines will be sharply drawn between those who have grown tired of the American form of government, with its checks and balances, its safeguards, its guarantees which protect the weak and those in the minority as well as the strong and powerful,—those who are willing to abandon all this, on one side, and on the other, those who sincerely believe that the Constitution is worth preserving, that if it needs change there is an orderly method provided, that it is better to hold fast to the good which we have than to leap blindly into the dark. In this impending struggle the lawyers of America, I know, will be found largely on the side of those who are willing to make every sacrifice to maintain the faith of our fathers.

ANNOUNCMENT OF 1938 ESSAY CONTEST CONDUCTED BY AMERICAN BAR ASSOCIATION PURSUANT TO TERMS OF BEQUEST OF JUDGE ERSKINE M. ROSS, DECEASED

INFORMATION FOR CONTESTANTS

Subject to be discussed:

"The Extent to Which Fact-finding Boards Should Be Bound by the Rules of Evidence."

Time when essay must be submitted:

On or before March 1, 1938.

Amount of Prize:

Three Thousand Dollars.

Eligibility:

Contest will be open to all members of the Association in good standing, except previous winners, officers, members of the Board of Governors, and employees of the Association.

No entry will be accepted unless written specially for this contest and not previously published. Each entryman will be required to assign to the Association all right, title and interest in the essay submitted. Any essay not desired for further use by the Association will, upon request of its author, be returned and the interest of the Association therein waived.

No entry shall contain more than 10,000 words, including quoted matter and footnotes, but citations will not be counted. Each contestant must agree to abide by the decision of the Board of Governors in the selection of the winner and on any question raised.

Procedure:

Anyone wishing to enter the contest shall communicate promptly with Olive G. Ricker, Executive Secretary, American Bar Association, 1140 North Dearborn Street, Chicago, Illinois, who will furnish:

(a) entry number in quadruplicate, in a container sealed prior to receipt of any application, so that the number therein may be known only to the recipient;

(b) large envelope, addressed, for mailing essay;

(c) small envelope, addressed, for mailing one of the entry numbers together with printed form to be filled in by the contestant to show name and address; which will thereafter not be opened until the winning essay has been selected and its identifying number announced.

Essay is to be submitted in triplicate, typewritten, double spaced, on one side of plain white paper, letter size (8½x11), and mailed as first class matter, without folding, in the envelope furnished for that purpose, on or before March 1, 1938. Total number of words on each page of the text shall be typed on bottom of each page of at least one copy. For identification, one of the entry numbers furnished for that purpose shall be affixed to each of the three copies of the essay. Any other identifying mark on the essay or on the envelope containing the same, or on the envelope containing the fourth number and the name and address of the contestant, will disqualify the entry.

The fourth entry number shall be attached to a printed form on which the entryman shall type his full

name and address, sign the agreement printed thereon, and then seal for mailing in the envelope furnished for that purpose. That envelope, when prepared for mailing, will be held by the entryman until March 2, 1938, and then mailed. It is not to be mailed in or with the envelope which contains the copies of the essay, which must be postmarked not later than March 1, 1938.

No additional information will be given by the Executive Secretary. Any questions raised will be submitted to the Board of Governors for consideration.

ADDRESS OF HON. HATTON W. SUMNERS

As We Look to the Future, We Appreciate That We Are Actually Approaching the Peak of the Crisis When It Will Be Determined Whether or not Our Economic Structure Will Stand and Whether Our Government Itself Will Stand the Strain—Beneficial Side of the Court Controversy—The Fate of the Nation Is in the Hands of the People and Only a People with Governmental Capacity Can Save Our Institutions—Where Our Government Came From—Possibilities of State Cooperation, etc.*

I APPRECIATE very much the privilege of talking with you this evening. This evening a representative of the press asked me for my manuscript. I told him I didn't have a manuscript. He said, "Are you going to speak extemporaneously, then?"

I said, "Worse than that."

I believe the time is coming in America anyway, when we ought to recognize that operating a great system of government is a practical thing. The time has come when the people of America must gather around council tables and give plain, practical, common sense consideration to the problems of their government. We have passed the time when oratory meets the requirement of the situation. I know it is expected I shall say something about the Court and I am going to get through with it.

I am going to disappoint you, too, I am afraid. I tried to avoid this controversy about the Court. Then, when I saw that that issue was driving lines of cleavage among our people, driving lines of cleavage among the officers of the government and between the departments of the government, I sought to stop the agitation.

It is my judgment, however, looking back, that that controversy, expensive as it has been to us, has been worth far more than it has cost us. As a nation we were dying of inaction, for in the war we went to the other extreme, from the peak, highest peak, perhaps, of unselfish world patriotism that any people ever reached. We swung to the other extreme, we became a nation of children in the presence of great responsibility, and we entered upon the grand age of jazz. Everybody tried to act young and everybody acted foolish.

It has only been in the last three or four years that anybody in this country, almost, could be interested by plain, practical consideration of a serious matter. I believe this agitation has done more to make our people think, to make our people return to the responsibilities of free government than anything that has happened in two decades. But, as I look to the immediate future, as I consider the job ahead of us, I am concerned that neither that issue nor any other issue shall be permitted to divide our people at a time when the problems of this people require a solidarity among our people and a cooperation among our departments of government which we have never required before.

I hope in these statements I am making I will not appear to be trying to lecture anybody. I think everybody now who has any appreciation of our situation is humble in the presence of our difficulties.

As we look to the future, we appreciate that we are rapidly approaching the peak of the crisis, when it shall be actually determined whether or not our economic structure will stand and whether or not our government will stand a strain. I mean literally a strain, not something to be dreamed about, not something to be talked about as though it were on another planet, not something to be discussed academically but a proposition right square before the people tonight, where I stand here and you sit there. It is something on which nobody can venture an expression of judgment.

That is a pretty serious consideration to confront a people. We have got to balance the budget. We have got to decentralize governmental responsibility. What is more, the people of this nation must begin to give to this nation the only safeguard which a free government can have, and that is an intelligent, advised public opinion.

There is only one thing I am concerned about. If I knew we had it, I would know we can win. If we have a people with the governmental capacity to preserve our institutions, I know we can win, for I know it is not written in the Book of Destiny that only a President and a handful of members of Congress are going to get all the benefit that comes from the struggle with

*Address delivered before the Assembly of the Association on the evening of Wednesday, Sept. 29. The address was extemporaneous and is printed from the stenographic transcript.

these difficulties. I know that, regardless of how great the President may be, how great the members of an office may be in other positions, only the greatest people that ever walked the earth can save my nation.

That is what I want you to go and tell your people, that this government is not in Washington and its fate is not within the keeping of the President. The fate of this nation is within the keeping of the American people. This government is back among you people. You can tear down your Constitution. You can tear down your capital, and if you have a people with government capacity, as you have, they can write another Constitution and they can build another capital; but if the foundation, the governmental capacity of the people, ever fails in America, then the situation is hopeless. We are looking too much to Washington. People ask me about Washington. I come back home to see whether or not I have a people that can win the fight. We have no king. We have no hereditary nobility. There are no governors in America except the people, and, if we fail, it is the people's fault.

The time has come, my friends, and I hope when I speak with certainty that I will not appear to be speaking with presumption—you boys look at me. (President Hutchins of the University of Chicago had just entered and taken his seat on the platform). I am not as good-looking as that fellow, and I am not going to try to speak even in proper sequence tonight. I am not going to attempt fully to develop any thought, because I appreciate the fact that I am speaking to an audience of trained thinkers, and I have not much time. I am going to cover a heap of space, and I want all the help I can get from you.

The greatest statement, the wisest statement that came to us from the literature of the Revolution, came from the convention of Virginia. It was to the effect that there can be no liberty without frequent recurrence to fundamental principles. When I first went to Washington I heard people talk about fundamental principles. I haven't heard it for many years. We don't hear it among our people.

HON. HATTON W. SUMNERS

Doctors recognize the necessity to recur to fundamental principles. They go to school to learn the laws of God Almighty that govern the human body before they ever attempt to practice medicine.

We have schools of science that have no other business than to teach fundamental principles. No human being would attempt in any field now to go forward without knowing something of the fundamental laws that govern in the field of his activity—with only one exception, and that is the great field of economic and political government; and that is the great field of human failure now.

Governments are not accidents. Governments are provided for in the big economy. Governments are themselves governed by natural laws which human beings must respect. Yet we do not recognize in the practical operation of government that there are any natural laws which limit human discretion and fix sound governmental policies. The fact of it is, my friends—I don't want to give any offense—the lawyers of America have been going along with illogical tales with regard to the origin and nature of our Constitution instead of telling the people the truth as to where it came from.

There were great men who sat in the Constitutional Convention but it has been withheld from human genius to write the Constitution of a living government. It never was done and never will be, in a creative sense. Our Constitution came from the same source that trees came from. I want to get over this point. The people no longer believe that there lived at one time a group of supermen, who met in a convention and out of their own creative genius fashioned the Constitution of a living government. They don't believe it. They are swinging away from reverence for our Constitution.

The fact of it is our Constitution is worthy of all reverence among a people who love liberty, because it came from God Almighty.

Governments are not accidents. They are provided for in the great economy, are themselves governed by natural law. The history of our Constitution can be traced for two thousand years. May I be pardoned for giving you the first picture of our own Constitution? Tacitus gives it to us. He looked in upon the Germanic tribes as they gathered from the forests of Germany, and he tells us that if there was a matter of governmental importance to be considered, the leaders submitted it to the people, and, if the people approved, they brandished their weapons, and if they disapproved, they murmured and that settled it.

So you have the place of leader and you have the place of people, but you have the voice of government spoken by the people. Then he tells this fascinatingly interesting thing that finishes the picture. He says that their leaders were influential, they had the power to persuade, as distinguished from their power to command.

When those people five centuries afterwards came to England, they planted in English soil those institutions. During the whole period of their history down to our time, even during the period of the Norman Conquest, those governmental institutions continued, and that system of government continued, and whenever we abandon that system, we abandon the Anglo-Saxon system of government.

We have never had a Mussolini or a Hitler or a Napoleon in Anglo-Saxon history. Why? Because we followed principles instead of leaders. That is the reason. Whenever we abandon principles, we abandon the Anglo-Saxon system of government. Governmental capacity, like every other capacity, is preserved by its exercise. Children learn to walk by walking. People learn to do everything by doing it, and people learn to govern by governing.

The reason we are in the fix we are in now is because, two decades before this, the people turned their backs upon the responsibilities of government. They couldn't be bothered. We blame politicians, and we blame this man and that man and the other man, and this group, that group and the other group. But fundamentally—I say it with all kindness—this is the people's government, and when the people quit governing somebody else governs. When the people quit thinking, somebody else thinks for them and charges them so much per think.

It is not an accident that we have these three coordinate branches of government. Let me get this across: They are the vital organs through which our sort of government functions. You can't have animal life without lungs. Human beings must have lungs, and Anglo-Saxon systems of government have to have these three coordinate branches. I hope I get by with that. Nobody ever said, "Let's have a legislature." There isn't a single fundamental provision in the American constitutional system that does not go back so far and spread out so broadly that it doesn't add to the legitimate fame of a single human being as its originator. It came from God. It came from the same place the tree came from.

I am going to hurry along, but I want to give you a few points there. Some of these younger lawyers, especially, may not have made the examination. In the Thirteenth Century, when the commission was sent to the shires to send up representatives of the people in order that it might be ascertained as to whether or not they would pay more taxes, and when the representatives of the people arrived at the seat of the central government in England, they had been trained in local government. They were able to take care of the people because they had been trained. The most magnificent picture in human history is the struggle of the representatives of the people, those who came up from the shires and the cities and the boroughs, to protect the people's rights.

Nobody ever said, "Let's have two houses." . . You know I think that really is funny—how that thing happened. I wasn't there but I know how it was. . . The representative of the folks, the ordinary people, couldn't talk about their business with the lords and they got to meeting, first one place and then another, and after awhile somebody said, "You know, boys, I have found there is a vacant room upstairs and there is nobody in there." After a while somebody looked in there and there were two Houses of Parliament, and nobody ever said, "Let's have it."

Nobody ever said in advance, "Let's support the judiciary," but the king got the control of the judiciary and the people said that wasn't right and they fussed about it, and when William and Mary came on the throne, it was decided they would hold for good behavior.

When we came over on this side and established our institutions, we claimed from the beginning all the benefits of Magna Charta. A contemporaneous historian says that a representative system of government broke out in Virginia sixteen years after Jamestown. It was inherent, it was instinctive among those people. We didn't have a revolution in this country, in an ordinary sense. We had a territorial secession and resort to arms to preserve an existing Constitution. All the pre-Declaration of Independence row was not that we didn't have a Constitution. The row was that we had a Constitution, and King George and the Parliament were violating it.

When we came to write our Constitution, it was perfectly natural that we should write into it those great provisions of human liberty that came down through the ages, developing out of necessity, tried by experience among a people peculiarly gifted with a genius for self-government. We wrote into our documents those things around which the battles of the Revolution had been waged. Of course we did.

So we do have a Constitution that has come through the ages, every single provision tested by experience, originating out of necessity. That is what we have got to preserve. How are we going to preserve it? Are we going to preserve it on Fourth of July occasions by merely worshipping at the shrine of our ancestors? The only way we can preserve it is by emulating their example.

What are we going to do about it? That is what I am going to talk to you about tonight. I wouldn't give a whoop for these resolutions and these big speeches. What are you going to do about it? Are you willing to join a battalion of death to save the Constitution and this system of government?

I believe we are going to win, probably; I am not sure. I believe so. I have been going home feeling out the people, talking to the people, and it is my judgment that within the last three years there has come a regen-

eration in the American people that has no equal in human history.

I have been taking samples of people, seeing their attitude. When I have told my people that we haven't got an easy job, when I have told them that we have jazzed off into the jungles and there is no boulevard that leads out, that we have to cut down the trees and go out over the stumps, they have answered that they weren't afraid to tackle the job. I believe we would have done the job sooner if those of us who hold positions that enable us to know the truth had come back and told the people the truth. I don't think we need to be afraid to tell our people the truth now. I don't think we need to be afraid to tell the truth for fear they will get scary, nervous and jittery. If they can't face the facts, we can't win through, anyhow.

Do you tell me we have got an easy job? We have got the hardest job that any people ever had to tackle on this earth, so far as I know. Now let me give you another point. I am just hitting a few high places. You have a real speaker here, and he has his all written out.

One of the most interesting things about Anglo-Saxon systems of government that I have observed is this: First, it is perfectly evident that there is such a thing as an instinct of governmental preservation. I don't have the slightest doubt about it. Government is as much an entity as you are an entity. Government is an agency of yourself, and you are the agents of government. Let me get that across. You are an agent of government and have to do its work, and if you refuse to do its work, the work of government of necessity, having to be carried on, then government lays its hand on a dictator. That is a pretty involved statement. I want to clear it up a little. From my examination of history, there has never been a case where a people who once possessed the power of self-government ever lost their freedom (except by conquest) save in those cases where they got so inefficient, as compared to their difficulties, that they were no longer able to tender within themselves an agency through which the government could be carried on. I am afraid that I used too many words then.

The only reason why Hitler is in Germany tonight is because the German people divided themselves into thirteen parties, each little group fighting for something for itself and not standing on any fundamental principles. There was no national solidarity, and when the great test came they couldn't do the job, and government reached over and put its hand on Hitler.

People ask me if I think we will have a dictator in America. It depends entirely upon the people. If the American people cease to be able in themselves to carry on the government of this country, since government has to be carried on, a dictator is absolutely certain.

We have thus far avoided a dictator, with probably one exception, in Anglo-Saxon governmental history, because we have developed the instinct and the genius to sense the existence of a crisis which requires a quicker pick-up and a stronger power than Anglo-Saxon institutions ordinarily afford; and in such a situation we have had the genius to concentrate in the executive emergency power to deal with an emergency suitation, but also the genius to retain the power to control its exercise and the power to recapture and redistribute it when the emergency is over.

To that fact is due the sort of government we nave had during this administration, to a very large degree. When this administration went into power, the whole economic structure was about to fall and, instinctively, that thing happened. Now we are getting the reaction from that. We are getting a movement in the other direction, and that explains a good deal of what is happening now.

I want to get this over if I can: just as Anglo-Saxon peoples move instinctively in the direction of concentration of power in the executive, when there is a crisis that requires it, and requires a quicker pick-up and stronger power, after awhile they instinctively begin to move in the other direction. If they didn't, they would lose the power of self-government, because the power to govern is retained only by its use. If you tie your arm by your side, the power goes out of it. The fish in Mammoth Cave have no eyes. We ought not to retain any longer than necessary these extraordinary concentrations of governmental power, and I say that in all respect to the President, and in all respect to everybody.

You know, I appreciated very much those kind words of introduction. He said nearly everything I told him to say. I did want him to mention that I had been nominated for President. A Republican ex-Justice of the Peace over in Virginia did that. We know that justices of the peace are the smartest people in the world, but I didn't know it also applied to Republicans.

I don't want to talk to you folks too long and put you to sleep before my friend speaks, but probably you folks have been staying in these downtown hotels and have learned how to stay awake anyhow. . . I will yield to questions for ten minutes. I will yield to any questions anybody wants to ask me. (No replies.) Well, I think your judgment of my ability to answer is just about right.

There is one thing I tremendously appreciate. Seriously, I appreciate this privilege of just talking to you tonight. Tonight, men and women, we are at the highest peak in history. This is a fascinating time. Of course, governments are always subject to the laws of cause and effect, but this seems to be one of those rare times in the history of time when the nations are called to judgment. The nations of the earth tonight apparently are standing at the judgment seat. The balance sheet is being struck. The peoples of the earth and civilizations are being compelled to answer under the philosophy, apparently, of the parable of the talents. It is a terrible thing to be in a place of responsibility at a time like that. When we look about us over the earth, we see that free government is disappearing from the earth. When we make an examination of our own country we see these same causes that have worked the destruction of liberty in the other nations at work here.

I feel hopeful that we are going to win through. And there is one thing that is happening that I want to call to your attention. I came up here primarily to attend this Conference on Interstate Crime. I had something to do with originating that legislation. You know the States are losing their power to govern in no small degree because they are not properly exercising the powers they possess. There are two sides to this concentration of power in the Federal Government. Heretofore when the State has confronted a proposition that is beyond its capacity to handle, dealing with it alone, it has cried out for Uncle Sam to come, and many times it has cried out before there was any need of that sort.

This movement is an attempt on the part of the States, by cooperative effort, to do that which hereto-

fore has been and is beyond the governmental capacity of the single State. If they can demonstrate the ability to do that, probably our States can do that in many other respects. . . These State governments operate, in the main, through local units of government, small units of government. In those units of government, the voice of the individual may be heard and the influence of the individual may be felt, but when you transfer a power to the Federal Government you put it beyond the reach of the average man. The voice of the individual is drowned in the voice of the multitude.

Take the executive branch of the government through which this organization functions—there are around one million people operating the executive machinery of the government. As a matter of practical common sense, we know that there is only one of all those people, who is elected and that is the President. Let us look at it just a minute. We know that the President cannot, in good conscience, be held responsible for what is done by those under him, because he doesn't know who they are, he doesn't know where they are, and he doesn't know what they are doing.

This has come about while we have been preserving the exterior of the representative system and have been talking about having a system of government by officers selected by the people. While we haven't been changing so much the written document, we have been changing the Constitution of the system of government with a rapidity unequalled in all time, with representative form of government susceptible of popular control drifting toward a great Federal bureaucracy which we know the people can't control.

I appreciate very much this opportunity to talk to you, but I guess I had better quit.

REPORT OF THE SPECIAL COMMITTEE ON THE SUPREME COURT PROPOSAL

TO THE AMERICAN BAR ASSOCIATION: In presenting its report, the Special Committee on the Supreme Court submits the following recommendations, for the action of the Assembly and the House of Delegates:

Recommendations

1. That a Special Committee of seven members be created by the Association, to continue the advocacy of the views voted by the membership of the Association in behalf of an independent judiciary;

2. That such Special Committee of the Association be authorized, under the supervision of the Board of Governors, to appear before, and to assist in any way that may be requested, the Special Committees created by the recent session of the United States Senate and House of Representatives, to study and report as to the judicial system of the United States;

3. That in the event that substantial changes affecting the Supreme Court or other Federal Courts are proposed and under serious consideration at a future session of the Congress, a referendum vote of the membership of the Association shall be taken, pursuant to Article X, Section 5, of the Constitution of the Association, upon such proposals; and that the results of such referendum vote shall thereafter constitute the instructions of the Association to such Special Committee; and

4. That your present Special Committee on the Supreme Court Proposal be discharged.

The Membership Gave Your Committee Its Mandate

Your Special Committee was created as a means of carrying out the instructions voted by the members of the Association, through the referendum taken by mail ballot upon the various proposals made as to the Supreme Court and other Courts of the United States, in the Message of February 5, 1937. The results of this referendum, by States, with the members of the Junior Bar Conference polled separately, were published in the *American Bar Association Journal* for April, 1937 (pages 271-277).

Subsequently a poll of lawyers who are not members of the Association was taken upon the same proposals. Opportunity to vote therein was accorded to all non-member lawyers whose names and addresses appeared in available lists. More than 50,000 non-member lawyers voted in this further referendum. The results, by States, were published in the *American Bar Association Journal* for May, 1937 (pages 338-343, 381-388).

In every State and in the District of Columbia, the vote was in opposition. Members of the Junior Bar Conference (lawyers under 36 years of age) voted more than four to one in opposition. The proposed increase in the number of judges of the other Federal Courts was disapproved by a vote of 3½ to 1, in the member referendum. The five other proposals were approved, by varying majorities.

The advisory vote of the non-member lawyers was to similar effect, and showed that upon the great issues affecting the Courts of the United States, members and non-members think alike. Various referenda taken by many of the State Bar organizations in different parts of the country showed a similiar preponderance of opinion of their members, in opposition to the Supreme Court proposal (*American Bar Association Journal* for May, 1937, pages 341-342). Some 33,500 lawyers voted in the State Bar referenda, and the ratio was more than 4½ to 1 in opposition. In the House of Delegates, composed of the chosen representatives of about 100,000 lawyers, the vote in opposition was 130 to 7.

Your Special Committee at all times regarded the decisive vote of the Association membership as constituting its instructions and mandate upon the pending proposals. In all that was done by your Committee, we were acting in behalf of the ascertained views and wishes of the great majority of Association members taking part in the referendum, whose instructions were reinforced by the majority opinion in the votes cast by more than 50,000 laywers who are not members of the Association, as well as by the referenda conducted by the State Bar organizations in twenty-seven states. The fact that the lawyers in every state—North, South, East and West—voted the same way upon the Supreme Court issue showed that there was and could be no

sectionalism or partisanship in that attitude of opposition. Your Committee was greatly aided by the fact that its mandate came directly from the rank and file of lawyers and that your Committee was able to present a Nation-wide consensus of opinion among lawyers, irrespective of locality, normal political affiliation, or membership in the American Bar Association.

Intermediate Reports by Your Committee to the Membership

Owing to the public nature of its work and the time elements involved therein, your Committee made intermediate reports to the membership of the Association, through the columns of the *American Bar Association Journal:*

Issue for June, 1937—pages 401-405.

Issue for July, 1937—pages 491-495, 559-560.

Issue for August, 1937—pages 572-582, 647-648.

The contents of those three intermediate reports are made a part of this report by reference, without repetition herein. Your Committee will ask leave to include appropriate parts thereof in its final report, for publication in the annual volume.

Objectives of Your Committee

Although the members of the Association had voted strongly against the proposed increase in the membership of the Supreme Court and other Courts on the basis of age, your Committee was of the opinion that the Association would best render a public service by promoting a fair and thorough discussion of the Court issues, by authoritative representatives of both sides, to the end that an informed and aroused public opinion would make or control the ultimate decision as to the fate of the proposals.

Accordingly, your Committee took the lead in making the arrangements for public meetings on the Court issues, in many of the principal cities of the United States. Usually, these arrangements were for meetings in the nature of public debates, with recognized spokesmen for each side presenting the opposing views. In many instances, these addresses were broadcast by radio, either locally or on regional or Nation-wide hook-ups, and thus were heard by many listeners in addition to the large local audiences. A great number of smaller meetings were also sponsored; speakers were obtained for local Bar Associations and civic organizations, as well as for community meetings; and everything practicable was done to further a full and fair presentation of the Court issues to all citizens, who were urged to communicate their views, either for or against, to their representatives in the Congress.

Your Committee recommended to the Editors of the *American Bar Association Journal* that the official organ of the Association should likewise publish articles in support of the pending proposals, as well as articles in support of the official attitude of the Association. This recommendation was accepted and followed, and your Committee aided in arranging for authorized presentations by distinguished proponents of the pending proposals.

SYLVESTER C. SMITH JR.

The minority as well as the majority views were thus fully presented, under Association auspices and through Association channels. Although a great majority of of the Association members were strongly opposed to the increase in the Courts, they recognized that the interests of both the public and the Association would be served by a full presentation of both sides of the issues. Members who held the minority view generally recognized that the Association should take the stand voted by the great majority of its members, and they cooperated in bringing about the full public discussion which was desired by the majority and minority alike.

Activities of Your Committee

Immediately upon its organization, the principal task of your Special Committee was the representation of the Association, and the presentation of the views voted by members and non-members, before the Senate

Committee on the Judiciary. Members or representatives of your Committee were present throughout the hearings, and rendered such assistance as they could, to the members of the Senate Committee and to witnesses appearing before the Committee at its request.

Your Special Committee was invited by the Senate Committee to present views of the Association upon the pending proposals. The detailed results of the referenda conducted by the Association and by the various State Bar organizations were placed before the Committee, and were also sent to all members of the Senate and House. The statements made before the Senate Committee by the witnesses appearing in behalf of the Association were published in the *American Bar Association Journal* for May, 1937 (pages 315-337, 394). Your Committee also cooperated in bringing about the appearance and testimony of various witnesses whose experience and judgment were deemed likely to be helpful upon the matters under consideration.

The presentation in behalf of the Association conformed to the views voted by the Association members and non-members, and was made in a broad, nonpartisan way, in an earnest effort to be constructive and helpful to the members of the Senate Committee. The decisive vote in the referenda, showing the emphatic opinion of the lawyers in every State, was probably the Association's most effective contribution to the hearings. The impressive marshalling of factual data and reasoned opinion, against the proposed remaking of the Supreme Court and other Courts, was a substantial factor in bringing about the historic adverse report, by a majority of the Senate Committee, against the Ashurst-Maverick bill (S. 1392) then pending.

From the opening of the hearings, it appeared clearly that the Association, through its Special Committee, could render practical assistance in the research field, in the development of historical and constitutional data pertinent to the subject. This assistance was requested and rendered to members of the Congress, during the hearings, and to those who were to speak and write in public discussion of the issues. The necessary research staff was created and maintained for this purpose, largely on a volunteer basis. Your Committee belives that its work in this respect contributed substantially to the general public understanding of the issues at stake.

In letters accompanying the referenda ballots, the Association urged that all lawyers and other citizens should make known their views, for or against the Court proposals, to their Senators and Members of Congress. Other civic organizations joined in urging such an expression of the views of citizens, whether for or against the pending proposals. The result was an impressive demonstration of public opinion, preponderantly against re-making the Supreme Court by legislative enactment.

Developments in the Congress

Early in the long contest over legislation affecting the Courts, the Sumners bill, approved by the Association at its Boston meeting in 1936 and by the members of the Association in the referendum, became law. It extended to Justices of the Supreme Court the same retirement privileges, at full pay, as had been enjoyed by judges of other Federal Courts.

The Ashurst-Maverick bill (S. 1392), as introduced in February, was substantially disposed of by the adverse report of a majority of the members of the Senate Committee on the Judiciary, and was not thereafter pressed for passage.

The Logan-Hatch-Ashurst bill, brought forward in June as a so-called "compromise" measure, was substantially as objectionable as the original bill, because based on essentially the same principles. Public opinion rallied against this measure also; and it was finally recommitted in the Senate, under an agreement that legislation affecting the Supreme Court would not be renewed at that session of Congress. If debate on this bill had proceeded, with a view to pressing it for passage, the members of the Association would have been given an opportunity to vote upon its specific proposals. Decision for such a referendum had been reached by the Board of Governors, upon the recommendation of your Special Committee, a few days before the bill was recommitted.

Chairman Sumners' bill for the improvement of procedure in constitutional cases in the Federal Courts had meanwhile passed the House of Representatives, on favorable report by its Committee on the Judiciary. It granted to the Attorney-General rights of intervention and direct appeal in cases involving the validity of statutes of the United States. These two proposals had been approved by members and non-members of the Association, in the mail-ballot referenda. After the Logan-Hatch-Ashurst bill had been recommitted, the Sumners bill was amended somewhat by the Senate Committee; and a new provision was added to require that a three-judge Court be convened to hear and determine, in first instance, cases involving the constitutionality of Federal statutes.

This bill to improve and expedite the disposition of constitutional cases in the lower Courts of the United States was enacted. In the opinion of your Committee, its enactment was desirable and will tend to obviate grounds of criticism of the hearing and determination of cases involving the constitutionality of statutes.

Future Aspects of the Court Issue

Although the Logan-Hatch-Ashurst bill (S. 1392) is not likely to reappear, there appears to be no likelihood that efforts to re-make the Courts of the United States will not be renewed. Your Special Committee is of the opinion that the Association ought to maintain itself in readiness to meet such issues as they may recur, rather than to rely on impromptu organization for the purpose.

Legislative consideration of changes in the Federal judicial system is continuing, through sub-committees created from the respective Committees on the Judiciary. The Hatch-Burke resolution (S. Res. 161), adopted to this end, provides.

"RESOLVED, That a special committee ot five Senators who are members of the Committee on the Judiciary, to be appointed by the President of the Senate, is authorized and directed to make a full and complete investigation and study of all matters relating to the reorganization of the courts of the United States, the appointment of additional judges for any of such cours, and the reform of judicial procedure, with respect to which any bills or resolutions (including resolutions proposing amendments to the Constitution of the United States) have heretofore been introduced in the Senate or may hereafter be introduced therein during the Seventy-fifth Congress, and to report to the Senate from time ot time its recommendations with respect to such matters. The committee so appointed is further authorized and directed to make a special report to the Senate and to the Committee on the Judiciary with

respect to any such pending bill or resolution, if such report is requested by the Committee on the Judiciary.

"For the purposes of this resolution, the committee, or any duly authorized sub-committee thereof, is authorized to hold such hearings, to sit and act at such times and places during the sessions, recesses, and adjourned periods of the Senate in the Seventy-fifth Congress, to employ such clerical and other assistants, to require by subpoena or otherwise the attendance of such witnesses and the production of such books, papers, and documents, to administer such oats, to take such testimony, and to make such expenditures, as it deems advisable. The cost of stenographic services to report such hearings shall not be in excess of 25 cents per hundred words. The expenses of the committee, which shall not exceed $7,500, shall be paid from the contingent fund of the Senate upon vouchers approved by the chairman."

From such information as your Committee has received, these inquiries by sub-committees represent a sincere and constructive effort to see whether there is actual need for the consideration of changes in the Federal judicial system, through constitutional amendment or through legislation. Your Committee recommends that a Special Committee of the Association be authorized to give any desired assistance and cooperation to these sub-committees of the Congress.

It seems probable that these sub-committees will study and report upon various suggestions that have been made for constitutional amendments or legislation affecting the Courts of the United States. These proposals include:

The submission of a constitutional amendment fixing the number of Justices of the Supreme Court at nine.

The submission of a constitutional amendment fixing the membership of the Supreme Court at ten Associate Justices, one from each Federal judicial circuit, and a Chief Justice appointed at large.

The submission of a constitutional amendment for compulsory retirement of Justices of the Supreme Court at the age of 75 years, with or without a provision that such a requirement shall not apply to Justices in office at the time of the taking effect of such an amendment.

Members of the Association have not voted their views upon any of the foregoing proposals. It appears unnecessary at this time to make a recommendation to this annual meeting as to the attitude of the Association, upon either the submission of any such amendments to the Constitution or the ratification of any such amendments if submitted. Should any of the above proposals, or any others, reach the stage of serious consideration by the Congress, the attitude of the Association thereon ought to be promptly determined by mail-ballot referendum to its members. At all times during its work, your Special Committee has maintained that if changes are to be made in the size or the functioning of the Supreme Court, such changes in the judicial branch of government should be brought forward as amendments to the Constitution of the United States, so that their taking effect would be by the ratification of the States and the people, rather than by merely the action of the legislative and executive branches of government.

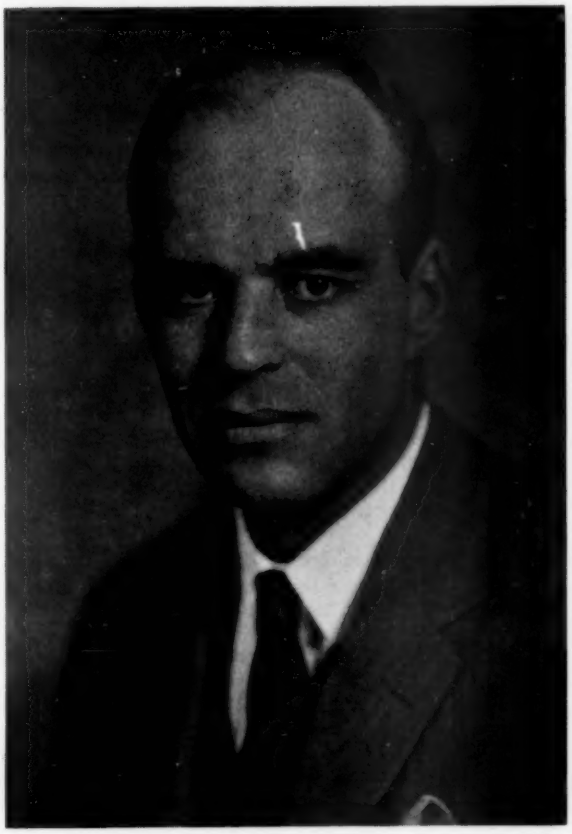
In the opinion of your Special Committee, the maintenance of an independent and untrammelled judiciary, chosen for qualifications for judicial work, will require unceasing vigilance and efforts on the part of lawyers and other citizens, and is essential to the preservation of our American system of democratic Government. The defence of free courts is a duty and high privilege of the organized Bar. Constant efforts to improve and speed up the administration of justice will constitute an effective part of that defense.

Conclusion

In submitting to the Association its final report and asking for discharge, your Special Committee expresses its hearty thanks and appreciation to the many civic organizations and individual citizens who assisted the Committee or cooperated in behalf of its objectives. In everything which your Committee did in behalf of the Association, sectional and partisan considerations were altogether eliminated; and the purpose was only to present the vital facts fairly and fully, to the public and before the Congress, to the end that the great debate and its outcome in the tribunal of public opinion might be worthy of the momentous issues.

SYLVESTER C. SMITH, JR.,
Chairman;
JAMES D. CARPENTER, JR.
C. R. WHARTON,
ROBERT F. MAGUIRE,
ALEX. W. SMITH,
Special Committee.

September, 1937.



LLOYD K. GARRISON

Mr. Garrison, who was elected member of the Board of Editors of the AMERICAN BAR ASSOCIATION JOURNAL, to fill the vacancy caused by the resignation of Hon. R. E. L. Saner, who retired because of ill health, has had a distinguished career in the field of legal education and public service.

House of Delegates

(*Continued from page* 861)

Mr. Lloyd K. Garrison, of Wisconsin, member of the Committee on Labor, Employment and Social Security, presented its report, in the absence of the chairman, and moved the adoption of its first recommendation. This was that it be empowered to make a continuing study of the Social Security Act and of the National Labor Relations Act and of related statutes and their administration, for the purpose of formulating and presenting to the Association detailed recommendations from time to time. Adopted.

He then presented the second recommendation: "That the committee, informally and without commitment on the part of the Association, establish contact with the administration officials and official committees concerned with the administration or amendment of the statutes, for the purpose of keeping the Association advised of the substance of proposed amendments or regulations, with the approval of the Board of Governors first obtained as to any specific action, collaborating informally to aid in the improvement of the statutes." The resolution was adopted.

Section of Criminal Law Presents Recommendations

Mr. Morris B. Mitchell, of Minnesota, Chairman of the Section on Bar Organization Activities, stated that, in view of the lateness of the hour, he would simply ask that the report of the committee be received and filed. Mr. Rollin M. Perkins, of Iowa, Chairman of the Section on Criminal Law, stated that at its meeting on Tuesday the Section had passed two resolutions which he would present. The first one urged cooperation among the states to control crime. After reciting the fact that the Interstate Commission on Crime of the Council of State Governments, with the assistance of the National Conference of Commissioners, has secured the enactment in more than half of the states of four model acts to enable the states to cooperate in the control of crime; and the further fact that, in accordance with such legislation, the Governors of a number of states had gathered to unite their states by an Interstate Compact on the supervision of out-of-state parolees and probationers, twenty-five states in all having joined therein; and the further fact that almost half of the states have not joined in this forward-looking, practical, cooperate action, the resolution concludes:

NOW, THEREFORE, BE IT RESOLVED, That the American Bar Association go on record in favor of, and urge the various States and local Bar Associations to give their active support to the enactment in every State of the Union of the four-point legislative program of the Interstate Commission on Crime of the Council of State Governments, consisting of: First, the act for the fresh pursuit of criminals across State lines; Second, the revised act for uniform extradition; Third, the revised uniform act for the removal of out-of-State witnesses; Fourth, the act for the supervision of out-of-State parolees and probationers; and, finally, the execution of the Interstate compact under such last named act, to the end that our sovereign States may actively cooperate to control crime and protect the citizens.

Mr. Perkins moved the adoption of the resolution. Chairman Morris inquired if the Acts referred to were available for examination by members of the House. Mr. Perkins replied that he did not have them with him, but that they had already been adopted in more than half the states. Then followed a discussion largely along lines now familiar.

Objects to Approving Acts "Sight Unseen"

Mr. Charles Ruzicka, of Maryland, said that we were beginning to set a very bad precedent of voting on acts that we know nothing about. Mr. Wilson, of Wyoming, asked if these acts had been before the Commissioners on Uniform State Laws. Mr. John C. Pryor, of Iowa, replied that the Uniform Extradition Act referred to was the one which was adopted by the Conference of Commissioners on Uniform State Laws and approved by the Association years ago. The same was true as to the revised Uniform Act for removal of out of State witnesses. A few changes had been made in these Acts by the Interstate Commission on Crime but these had been subsequently approved by the National Conference.

Mr. John M. Slaton, of Georgia, said that if it was attempted to have this body express its approval of laws about which it knows nothing, the wise thing to do would be to refer them back to the committee or section, so that the House could have the proper information. Mr. William L. Ransom, of New York, stated that consideration by the Board of Governors might be better than any consideration the House could give the resolution at this time. He therefore moved that the resolution be referred to the Board of Governors with power to act, after conference with the appropriate committee of the Commissioners and also the officers and council of the Section.

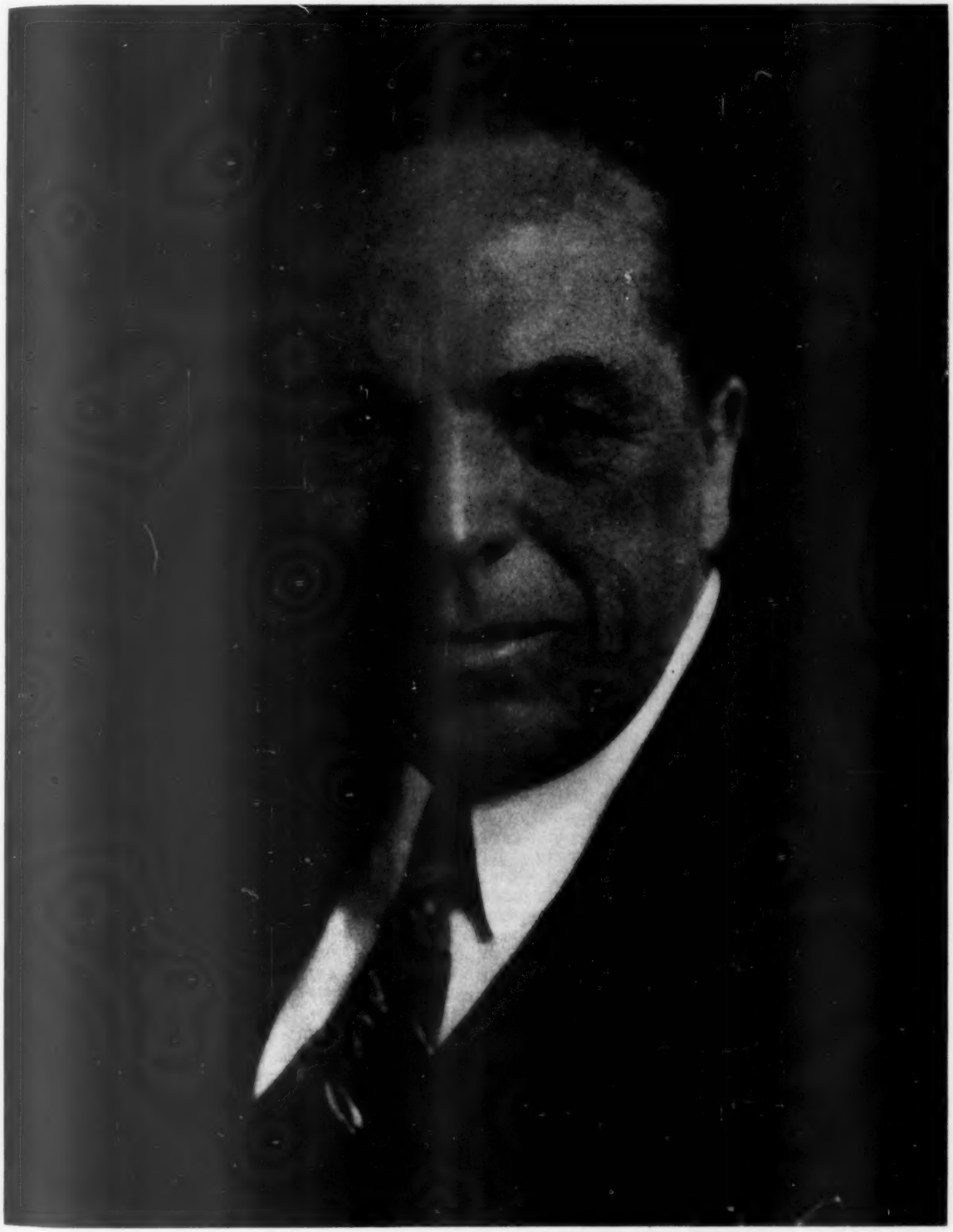
Mr. Warren P. Green, of Delaware, reminded the House that the Acts had been considered and passed in half the states of the Union. They have been approved by the National Association of Attorneys General and the other organizations. They were drawn with the assistance of law professors and the Commissioners on Uniform State Laws. The situation is that we need them now and not at some future time. If the House did not wish to endorse them because it did not know the exact details, then they asked it at least to endorse them in principle.

Chairman Perkins said the Section was not at all out of sympathy with Attorney General Green's suggestion. However, no amendment to that effect was offered, and the motion prevailed to refer to the Board of Governors with power.

More Effective Regulation of Pistols and Revolvers Approved

The second resolution from the Section approved the passage of the National Firearms Act of June 26, 1934 and recommended its extension or other appropriate legislation, to regulate the traffic in and transportation of pistols and revolvers; expressed appreciation of the interest shown by the Department of Justice and by Attorney General Cummings, personally, in endeavoring by the promotion of appropriate Federal legislation to cooperate with the states in preventing the indiscriminate traffic in firearms; and urged state and local bar associations to seek the enactment in their respective states of legislation to provide a more effective regulation.

Chairman Morris asked the secretary to read that section of the By-Laws which forbade resolutions com-



HON. FREDERICK H. STINCHFIELD

Who Presided at the Sixtieth Annual Meeting

mending any officer or member for any services performed. The secretary did so, and Chairman Morris said he was of the opinion that the provision would apply to the Attorney General as a member of the House. Mr. Vallance moved to strike out the personal reference in the resolution. Mr. Robert F. Maguire, of Oregon, questioned the chairman's construction of the rule. Did not that apply rather to work done in the Association? Chairman Morris said that his construction was open to discussion. In his experience he had seen the rule construed as he had construed it.

Mr. Conwell Smith, of Maryland, was inclined to question whether the House, without any consideration of the subject, should go on record as recommending that the traffic in firearms can be prohibited effectively or regulated by legislation. Every time we venture into a field which does not properly belong to the general activities of the Association, we run the risk of making a mistake.

There was some further discussion, at the close of which Chairman Perkins suggested that there was a risk that the Association might be too timid in taking a stand on matters of vital interest to the country. It seemed to him that it would be a wise thing to recommend more adequate regulation of pistols and revolvers.

The question was put and the recommendation was adopted.

Section of Legal Education and Admissions to Bar

Mr. Joseph D. Stecher, of Ohio, Chairman of the Junior Bar Conference, announced that its report had no recommendations. Mr. James Grafton Rogers, of Connecticut, submitted the report of the Section of Legal Education and Admission to the Bar, of which he is chairman. He stated that the report printed in the Advance Program should be supplemented by showing the approval of two more law schools by the Council of Legal Education since the report was submitted: the Brooklyn Law School and the St. John's Law School, both of the Metropolitan District of New York. He continued:

"Under these conditions, the situation in regard to the standards of the American Bar Association and their application through the country is this: 34 of the 48 states have substantially adopted the standards of the American Bar Association. In addition to that, it should be noted that at this time about 65 per cent of the law students in the United States are enrolled in approved schools. These facts illustrate the comment that the standards of the American Bar Association are more than substantially adopted and implemented in the United States.

"A second part of the report deals with two resolutions referred to the Section of Legal Education last year by the general meeting. Those two resolutions dealt with the encouragement by the American Bar Association of the growth of legal institutes, or of what is called post-admission education, throughout the United States.

"A very full report is contained in the printed booklet. It shows that there have grown up in the United States in recent years a very notable series of institutes open to the practicing lawyer. A number of cities, such as New York, Cleveland, Cincinnati, Toledo, and so on, have now established institutions for the discussion among lawyers, chiefly by specialized practitioners and professors from the law schools, of current developments in the law, which are self-supporting, and which make a notable new development in the field of the profession."

Post-Admission Legal Education Program Approved

The resolution recommending that the "American Bar Association sponsor and encourage a nation-wide program of post-admission legal education for the benefit of the legal profession" was, after some further discussion, put to a vote and adopted.

Mr. James L. Shepherd, Jr., of Texas, by unanimous consent, presented the report of the Section on Mineral Law, in the absence of Chairman Francis. The report made no recommendations and Mr. Shepherd merely asked leave to file a supplemental report giving certain information in connection with the Guffey Bill which was not available when the printed report was filed.

Mr. Bert M. Kent, of Ohio, Chairman of the Section on Patent, Trade-mark and Copyright Law, presented its report. This referred to a large number of pending bills, and the chairman took up those with respect to which the Section had taken action. This part of the report was approved.

The chairman then called particular attention to the Section's recommendation for a revision of, or amendment to, Section 19 of the TVA Act, so as to provide that a patentee shall have the same remedy against TVA, with respect to an infringement committed in connection with the commercial competition by TVA with any private enterprise, that a patentee would have against any private individual for a similar infringement.

Chairman Morris suggested that this was a broad, sweeping matter; that although it pertained primarily to patents, its collateral effects might be considerable. He said he would entertain a motion that the matter be referred to the Board of Governors with power to act and advise the Patent Section accordingly. The motion was made, seconded and passed.

Chairman Kent then presented a resolution recommending a government commission to revise, consolidate and extend the Federal Trademarks Statute for the purpose of giving greater security to trademarks, preventing deceptions in the sale of goods, and carrying out our treaty obligations. He moved the adoption of the resolution, but a substitute, referring the resolution to the Board of Governors with power to act, was offered and passed.

The report of the Section of Real Property, Probate and Trust Law was presented by General Nathan W. MacChesney, Chairman. The report of the Section, he said, was to be found at page 350 of the Advance Program. Certain recommendations were there made, but no action was asked on them at this time.

The first was that the Section be continued with its present name and scope, without change, and this recommendation was made because of the fact that consideration was being given by a Special Committee of the Board of Governors to a possible rearrangement and consolidation of the Sections. The second recommendation, that Section dues of $1.00 per member be imposed, to be billed concurrently with bills for the Association dues, had been approved by the Council and the Section itself and left to the Chairman of the Section to work out with the Board of Governors.

The third recommendation was for a budget, to include, if possible, the publication of a Journal and the employment of a paid secretary, but no action was asked on it at this time. The fourth recommenda-

tion, that any existing committee having subject matter belonging to one division of the Section, be consolidated with this Section so far as such subject matter was concerned, he said, is also being dealt with by the Special Committee of the Board of Governors. The fifth recommendation that membership in the Association carry membership in at least one Section without additional dues, represents the considered judgment of the Section and its Council, and was made with the hope that it would be given consideration.

The purpose of the report, Mr. MacChesney continued, was to show that the Section had been able to work out its program and function as intended. He believed that it had sufficient cohesion to justify its continuance. He then gave details of the meeting which had just been held, showing that the program had been completely carried out, with the exception of one speaker. The Section, he added, is now the largest Section of the American Bar Association, having 5,943 members. It has become so large that careful organization, a definite program and an adequate staff are deemed to be essential if it is to function efficiently. He invited all members of the Association interested in its work not merely to join the Section, but to participate actively in its deliberations and committee work.

A copy of a proposed restatement of the uniform mortgage act was attached to the report of the Section. At the following meeting of the House, Chairman MacChesney asked that it be referred without comment to the National Conference of Commissioners on Uniform State Laws, in accordance with Article XII, Section 15, of the By-laws. This was done.

Chairman Morris announced that the Board of Governors had created a new Special Committee to deal with Securities Laws and Regulations. No action by the House was required.

Fourth Session of House of Delegates—Reports of Committees—Sample Legal Public Relations Program Heard Over Radio—Importance of "Sustaining Memberships" Stressed—Officers for 1937-38 Elected

HOUSE has unusual experience: listens to actual radio broadcast of one of a series of legal stories put on the air by the Erie County Bar Association, in an effort to explain the profession to the lay public. Mr. David Diamond gives interesting details of the undertaking. Model bill relating to insurance companies not authorized to transact business in a State is referred to Board of Governors with power to act. House adopts recommendation of Section on International and Comparative Law that National Bar Associations of the several nations of the world unite in a cooperative project to restate international law, and authorizes Section to explore possibilities of project. Chairman Fairchild, of the Board of Elections, reports disillusionment of Board as to supposed purely honorary character of its duties. Chairman Rix, of the Special Committee on Ways and Means, appeals to each member to constitute himself a committee of one in his State to secure a sufficient number of sustaining memberships to enable the Association to carry on its work. House votes to empower the Board of Governors to act upon Uniform State Laws recommended by the Conference and those which may be recommended during the coming year.

THE first item on the calendar for the Fourth Session was the report of the Section on Public Utility. Chairman Elmer A. Smith of the Section, not being present, the report was passed. Then came the report of the Section on Insurance Law, presented by Mr. Jesse A. Miller of Iowa, Chairman.

Before taking up that report Chairman Miller presented a resolution which had been adopted by the Section, that the Constitution and By-laws of the Association and the By-laws of the various sections be amended so that a designated member of the Board of Governors would be on each section council as an ex-officio member thereof. The object was to establish a closer relationship between the Board of Governors and the various section activities. Chairman Morris announced that this resolution would be taken up later.

Section of Insurance Laws Makes Recommendation

Chairman Miller then read the report of the Section and presented a resolution as follows:

"That the action of the Section of Insurance Law in adopting the model bill relating to insurance companies not authorized to transact business in a State and providing for the obtaining of service of process on insurance companies and prescribing how a defense may be made by such companies."

He moved that it be approved, and explained that matters of this kind in the past had always been referred to the Conference of Commissioners on Uniform State Laws. However, the rules of the organization had been changed so it was not necessary at this time. Approval of the action of the Insurance Section was asked at once, so that the model bill could be furnished to the Commissioners of Insurance of the various States.

Mr. Sidney Teiser, of Oregon, stated that the Commissioners on Uniform State Laws were now engaged in drafting an act similar in purpose and form, and it seemed without justification to him to present a bill for approval when the matter was in the hands of that organization. Chairman Morris called attention to the By-law which provides that whenever a Section is considering any subject respecting proposed state legislation, it shall confer with the National Conference of Commissioners on Uniform State Laws, and asked whether such a conference had been held. Chairman Miller replied that it had.

Mr. W. E. Stanley, of Kansas, Chairman of the committee of the Conference which has this question before it, stated that the Conference would of course proceed with preparation of its uniform state law. He thought that Chairman Miller had moved to have the model bill of the Insurance Section approved by the Association because of a desire that the Insurance Commissioners of the States should have it for their use at the earliest opportunity; also because of the fact that, in the usual course of action in the Conference, it sometimes took from two to three years for it to finish its

work on a particular uniform state law. He felt that any uniform state law that went on the statutes would ultimately have to go through the Conference of Commissioners, but he did not see how it could possibly affect its action if the House merely gave its approval to this particular act.

Judge Harrison A. Bronson, of North Dakota, thought that it would be unfortunate if what might be termed a Uniform Act should be approved by the House, unless we wanted to get ourselves in a situation where we had two different organizations presenting acts on the same subject matter to our State Legislatures. He thought it would be particularly appropriate to refer the resolution to the Board of Governors for consideration and action.

Chairman Miller stated that the Section had no desire to usurp any of the prerogatives of the Conference of Commissioners, but he knew from experience in the Conference how long it sometimes took to get action. The Commissioners of Insurance throughout the country had been demanding that something be done, and was it not better to give them this bill now and let them use it, if they wanted to, than to let them prepare a separate bill in each State?

Model Bill Referred to Board of Governors with Power to Act

Mr. William L. Ransom asked if Judge Bronson's motion was to refer the Section's resolution to the Board of Governors with power to act after consultation with the Conference, and on being informed that it was to that effect, seconded the motion, as the best means to get such prompt action as could be had. Chairman Miller stated that the motion was satisfactory to him and withdrew his own original motion, and the reference to the Board was voted.

Chairman James Oliver Murdock, of the District of Columbia, presented the report of the Section on International and Comparative Law. He did not think it necessary to go into the report of the Section, but trusted that all would read it, as they were very anxious to get the viewpoint across that the United States, as large as it is, is nevertheless one of some sixty countries of the world, with which we have constant and important relationship.

After referring to the representation of American lawyers at the Second International Congress of Comparative Law at The Hague this summer, he presented a resolution in which the Association commended the recent action taken to strengthen the personnel of the Department of State and American Foreign Service, and urged further general strengthening and increase of such personnel, calling attention particularly to the desirability of appointing lawyers who are eminently qualified in international law to responsible positions in the Department and important diplomatic missions abroad.

At this point the program was interrupted for a statement by Mr. David Diamond, of the Buffalo, New York, bar, with respect to the radio program carried on by the Erie County Bar Association last winter, and for a radio broadcast by a local station, giving one of these programs. This was an unusual feature of the meeting, and the members showed interest in this exhibition of the means which had been experimentally adopted by the Erie County Bar Association, to get the message of the lawyers to the lay public. Mr. Diamond's remarks will be printed in full in an early issue.

Recommendations of Section of International and Comparative Law Considered

Chairman Murdock then resumed presentation of the recommendations of his Section. The second resolution favored the negotiation of additional treaties to prevent international double taxation, and for mutual assistance against tax evasion. Unanimously adopted. The third resolution commended the trend in institutions of higher learning in offering advanced courses in international law and recommended that these be taught only by experienced lawyers. Adopted. The fourth resolution favored the development of practical comparative law courses in law schools, and this was unanimously adopted. The fifth commended the steps taken by the State Department to bring Moore's Digest of International Law up to date, and recommended publication of a general revision thereof, and periodical supplements. Motion carried.

Resolution No. 6 recommended that the National Bar Associations of the several nations of the world uinte in a cooperative project to restate international law and authorized the Sextion to explore the possibilities of such a project. Carried. Resolution No. 7, recommended the adoption of an international statute of limitations on diplomatic claims, allowing a period of five years after the occurrence of a denial of justice for presentation of such claims.

Resolution No. 8 was to the effect that the Association endorses the action initiated under Executive Order of April 25, 1933, directing a study of the laws relating to nationality, and urges the prompt submission to Congress of recommendations relating to their complete revision and codifications. Mr. Nathan William MacChesney, of Illinois, seconded the motion and made a brief statement at the request of the Section Council, showing the importance of this particular resolution. At its conclusion he obtained permission to file a memorandum elaborating the statement. On vote, the resolution was carried.

Chairman Murdock then stated that the Section, at its recent meeting, had adopted five additional resolutions, which he would present. The first was to the effect that the American Bar Association favors cooperation with the other twenty-one National Bar Associations of the American Continent in promoting uniformity of law in the Americas through the study and investigation of mutual problems of law, and recommends that at the forthcoming session of the Eighth International Conference of American States at Lima, Peru, in 1938, representatives of the said Bar Associations meet to take appropriate steps for the preparation of projects on certain phases of comparative law problems pertaining to the Americas, to be considered at subsequent meetings held in connection with later Inter-American Conferences. Motion carried.

Favors Establishment of an American Academy of International Law

The second additional resolution was to the effect that the American Bar Association records its approval of the action of the Inter-American Conference for the Maintenance of Peace, concerning the establishment of an American Academy of International Law, and expressed the hope that the Academy might be established in the capital city of a Latin-American country in the near future. Carried. The next resolution was that the American Bar Association recommends that

the American Institute of International Law resume its regular activities, and that it take advantage of the forthcoming Eighth International Conference of American States at Lima in 1938 to hold a formal session on that occasion, to consider outstanding American questions of public and private international law. Adopted.

The next additional resolution approved the proposal for a school of Comparative Law adopted at the Second International Congress of Comparative Law at The Hague in 1937, and expressed the hope that means would be found to bring it into existence as a permanent institution. Carried. The fifth additional resolution commended the more vigorous and constructive program of publication which the Department of State has carried out in recent years in connection with the publication of the Foreign Relations of the United States, Treaties, etc., and other pertinent material, and urged adequate appropriations by Congress. Adopted.

At this point the recommendation of the Insurance Section for a closer relationship between the Board of Governors and the various Sections, to be secured by designating a member of the Board as an ex-officio member of the Council of each Section, which had been postponed earlier in the meeting, was taken up. Mr. William L. Ransom was in sympathy with the resolution, but thought that as it involved an amendment of the Constitution or By-laws of the Association, it ought to take the regular course and be subject to a report by the House Committee on Rules. Motion was made to that effect and the resolution was so referred.

Chairman of Board of Elections Reports

Hon. Edward T. Fairchild, of Wisconsin, Chairman of the Board of Elections, reported for that body. He said that when the institution came into being, the members had been assured that there was more honor in the job than service. That honor had been accepted in all humility, but when the referendum and other things swiftly followed, the members had changed their opinion of the importance of their function. In fact, in taking up the votes on these various matters, the Board had found that it counted considerably. The report of their various actions had been made as such actions were taken. Report approved.

Mr. W. W. Evans, of New Jersey, presented the report of the Committee on Credentials, which was received and filed. Mr. Sylvester C. Smith, Jr., of New Jersey, Chairman of the Committee on Rules and Calendar, desired to reply to inquiries which had been made at a previous session as to procedure on reports of the committees. The Committee on Rules wished to call the attention of members of the House to the fact that the Board of Governors, under Rule X, can place these reports on the Assembly calendar as well as on the House calendar. The Committee deemed Assembly action to be merely advisory where those reports are placed on its calendar. The Committee also felt that the Board of Governors should make its report on all committee reports first to the House of Delegates, in pursuance of Article XI of the By-Laws. That statement also covered constitutional amendments, on which the Board should report first to the House. The Committee was unanimous in that interpretation.

Chairman Rix Calls for Effort to Secure Sustaining Memberships

The Chair recognized Mr. Carl B. Rix, of Wisconsin, Chairman of the Special Committee on Ways and means. "The Committee on Ways and Means," Mr. Rix said, "is delighted to inform you that the emergency created during the past year has been met. We are concerned with the future and it was in line with that that we recommended to the Association the amendment of the By-Laws to provide for sustaining memberships. We are concerned with the method and successful operation of this Amendment. As you know, it is optional with any member to indicate that, in addition to his annual dues of $8.00, he will contribute year by year, or for such period as he desires, an additional sum of $25.00.

"It is obvious that we must be prepared, as Senator Burke said, to continue efforts of this Association; it is also obvious that we must implement the splendid work that is being done here through this House of Delegates, and that we must be prepared to put into effect and carry out all of the work of the Association through its committees and sections. The committee asks that each one of you, in going back to the States, do what you can to promote the object of the committee in securing these sustaining memberships. We submit that it is the democratic way, the obvious way of meeting any condition which may confront this Association in the future, and we hope that each one of you will be a committee of one in your state to see that a sufficient number of memberships of that type are secured."

Officers for Ensuing Year Elected

At this point Secretary Knight announced that at the meeting held in Columbus on January 5, the State delegates had made the following nominations which were certified to the Chairman of the House: For President, Arthur T. Vanderbilt, Newark, N. J.; for Secretary, Harry S. Knight, Sunbury, Pa.; for Treasurer, John H. Voorhees, Sioux Falls, S. D.; Member of the Board of Governors—for the Third District, Joseph W. Henderson, Philadelphia, Pa.; Fifth Circuit, David A. Simmons, Houston, Texas; Ninth Circuit, William G. McLaren, Seattle, Wash.

Chairman Morris then announced that there being no other nominations, the Chairman, on behalf of the House, would instruct the Secretary to cast one ballot for each of the officers mentioned. This was done.

Mr. William L. Ransom, of New York, presented a motion which, he said, would enable progress to be made during the year with respect to proposed uniform state laws that are endorsed by the National Conference. There was a feeling that there was a need for some agency which would be able to act promptly as to such matters. He moved that the House empower the Board of Governors to act in behalf of the Association in passing on uniform state laws recommended by the Conference, those which have already been recommended and those which may be recommended during the year. Adopted.

Special Committee on Survey of Sections and Committees Reports

Mr. John H. Voorhees, of South Dakota, Chairman of the Special Committee on Survey of Sections and Committees, presented its report. Mr. Voorhees set forth the action of the House of Delegates at Columbus last January, providing that the President appoint a Special Committee on this matter, with a view to working out a distribution of the work of Sections and Committees, so as to cover all important fields of law and make it possible for members to participate actively in the work of the Association.

Prior to that action, the Board of Governors, at the meeting in Columbus, had directed that a report be

made to them on this subject by the Administration Committee. This had been done, and the President of the Association considered that work largely preliminary and necessary in the proper discharge of the work of the committee to be appointed under the resolution of the House. He had therefore appointed the same personnel on the latter committee. This committee of the House had found it impossible to complete its work, which was more extensive than was contemplated at the time it was undertaken. The report therefore was practically only a report of progress.

The committee, he said, had attached to this report of progress copies of the former report to the Board of Governors. He stated that the committee had endeavored to be as fair as possible in appraising the work of the various Sections and Committees, but some of the members might not agree with that appraisement. In that case, the committee would be very glad to receive complaints and criticisms for further consideration.

The report of the House Committee concluded with the recommendation that it be continued "to complete its work under the Columbus resolution that it report from time to time during the ensuing Association year to the Board of Governors for its information and in order that the Board make such suggestions upon such reports as it sees fit; that the Committee make a definitive report to the House of Delegates at the 1938 annual meeting of the Association and that the Board of Governors, in connection with the said report, transmit to the House of Delegates its comments and recommendations thereon."

After certain suggested corrections in the appraisement as to the work of the Section on International and Comparative Law, which the Chairman said would be given careful consideration, the report was adopted.

Mr. Arnold Frye, of New York, Chairman of the Section on Municipal Law, stated that that Section's report had been printed in the advance program and contained no recommendations. It was received and filed.

Mr. William R. Vallance, of the District of Columbia, at this point desired to call attention to the fact that in the listing of delegates in the registration list, the delegates from Hawaii, the Philippines, and from Puerto Rico, had been placed under the heading of "Foreign." It was of course a clerical error, but it might have an unfortunate effect and he suggested that the matter be brought to the attention of the Headquarters Office for suitable correction. Chairman Morris stated that, upon inquiry, he had discovered that this was a clerical error and that an apology was certainly due to those members and the Chair was very happy to make it. The motion was adopted.

The Chairman then stated that the constitutional amendment requested by a representative of Puerto Rico at the Boston meeting, to give Puerto Rico representation in the House of Delegates with the same status as a State, had not been filed and proposed, on due notice, as a change in the Constitution. Technically the matter was not before the House, but care would be taken that, prior to the next annual meeting, notice would be given, so that appropriate action could be given consideration.

Resolutions of Thanks to Hosts of the Association at Sixtieth Annual Meeting—U. S. Senate Urged to Afford Public Hearings on Qualification of Judicial Nominees—Memorial to Late Senator Root

THE end of a long, laborious and highly constructive meeting for the House. Resolution of the Assembly that Association request U. S. Senate to adopt a rule requiring in every instance a full public hearing as to matters touching the fitness and qualifications of nominees for judicial office, is unanimously adopted. Resolution of thanks to the Association's generous and highly efficient hosts is adopted amid hearty applause. Memorial to the late Senator Root is read. Adjournment brings a feeling that sessions have been notable for affirmative accomplishment and for real correlation of the work of the Association, through the deliberations of a truly representative body.

AT the opening of the fifth session Chairman W. W. Evans, of the Committee on Credentials, reported that it had received the applications of the International Association of Insurance Counsel and the Maritime Law Association for admission as affiliated organizations entitled to representation in the House of Delegates. The committee was not prepared to report on their eligibility at this time, but would make its report at the next session of the House.

On motion of Mr. Charles A. Beardsley, of California, the new By-laws of the Section on Real Property, Probate and Trust Law were approved. Mr. Beardsley then presented the following resolution pursuant to the direction of the Board of Governors:

Resolution of Thanks to Hosts

WHEREAS, The Sixtieth Annual Meeting of the American Bar Association in session in the city of Kansas City, Missouri, during the week beginning September 27, 1937, has been the most largely attended meeting in the history of the Association; and

WHEREAS, The members of the Association and the members of their families who have come from near and far to this the center of the United States have received a most generous and hospitable welcome;

NOW THEREFORE, IT IS HEREBY RESOLVED, That the House of Delegates of the American Bar Association, speaking for the members of the American Bar Association, hereby express their sincere gratitude to the Missouri Bar Association, the Kansas City Bar Association, the Lawyers Association of Kansas City, the Independence Bar Association, the Women's Bar Association, the Kansas State Bar Association, the Wyandotte County Bar Association, and to the city of Kansas City, its officials and citizens for a hospitality that will be long remembered and appreciated by us all.

The resolution was adopted, amid great applause. Mr. William L. Ransom then stated that during the past year some 447 members of the Association had died. He asked to have their names spread on the

minutes of the meeting. He then said that during the past year the Bar and the country had lost a great leader, the Honorable Elihu Root, a former President of the Association, and that Mr. William Piatt, of Kansas City, had been asked to prepare a memorial to Senator Root. He asked unanimous consent for Mr. Piatt to read it. This was done.

Mr. George B. Klock, of New Mexico, gave some personal reminiscences of Senator Root. Mr. Ransom moved that the suggestion of Mr. Piatt that the memorial be entered in the record be adopted. It was seconded by Mr. Philip J. Wickser, of New York, and passed unanimously.

The Amende Honorable to Delegates from Hawaii, Puerto Rico and the Philippines

Secretary Knight then presented certain messages from the Assembly to the House. The first presented a resolution offered by Col. Hugh C. Smith, of Washington, and passed by the Assembly, regretting the error made in classifying the delegates from Hawaii, Puerto Rico and the Philippines as "Foreign" in list of those in attendance and instructed the Secretary of the Association to prepare, for the signature of the President, letters to the Governors of Hawaii and Puerto Rico and the President of the Commonwealth of the Philippines, and to each of the delegates from those places tendering the apologies of the Association for the inadvertency. Adopted. The House was also advised, Secretary Knight stated, that the Assembly had referred the resolution dealing with the decision of cases involving constitutional questions to the Special Committee on the Supreme Court. This called for no action by the House.

The Assembly, the Secretary continued, had also passed a resolution, recommended by the Committee on Resolutions. This called for action by the House, regarding nominations for judicial office. The resolution was unanimously adopted, as follows:

RESOLVED, That the American Bar Association petition the Senate of the United States to establish a rule requiring every nomination for judicial office to be referred to an appropriate committee, and providing that such committee shall in every instance afford a full public hearing upon matters touching the fitness and qualifications of the nominee for the judicial office.

AND BE IT FURTHER RESOLVED, That a copy of this resolution be transmitted by the Secretary of the American Bar Association to the Vice President of the United States with the request that it be laid before the Senate on the first day of the next session of Congress.

The meeting of the House thereupon adjourned; and the final session of the Assembly, which had been held open to await action by the House on resolutions, was convened and adjourned, thereby closing the 60th annual meeting.

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NOTICE BY THE BOARD OF ELECTIONS

PURSUANT to the provisions of the amendment to Section 5, Article V, of the Constitution, adopted at the Sixtieth Annual Meeting of the Association, the Board of Elections met at the Association headquarters on October 18, 1937, and determined that the following State Delegates should be elected in 1938 for one, two, and three-year terms, respectively:

One-Year Term

Maine
Connecticut
New Jersey
District of Columbia
South Carolina
Mississippi
Texas
Michigan
Illinois
Iowa
Nebraska
South Dakota
Arizona
Montana
Washington
Oklahoma
Wyoming

Two-Year Term

New Hampshire
Rhode Island
New York
Delaware
Maryland
West Virginia

Georgia
Louisiana
Ohio
Indiana
Arkansas
Minnesota
Idaho
Nevada
Oregon
Colorado
Utah

Three-Year Term

Massachusetts
Vermont
Pennsylvania
North Carolina
Virginia
Alabama
Florida
Kentucky
Tennessee
Wisconsin
Missouri
North Dakota
California
Hawaii
Kansas
New Mexico
Territorial Group

In reaching this determination the Board of Elections allocated the terms so that in the future there would be seventeen State Delegates elected annually for a three-year term. The allocation also provides, as nearly as possible, that an equal number will be elected within the respective circuits, and that approximately one-third of the membership of the Association will be entitled to vote each year for the office of State Delegate.

The Board of Elections desires to call attention to the fact that, in accordance with the provisions of Section 5 of Article V of the Constitution, the time within which to file nominating petitions for the office of State Delegate will expire on February 25, 1938.

In order to facilitate checking the signatures on nominating petitions, the Board of Elections has adopted a rule requiring that each nominating petition or part thereof when filed shall be accompanied with a typewritten list containing the names and addresses of the members signing the petition in the order in which their names are signed.

The Board of Elections also calls attention to the fact that in Hawaii, Kansas, Kentucky, and New Hampshire, vacancies exist in the office of State Delegate. These, together with any other vacancies that may occur between now and February 15, 1938, will be filled pursuant to the provisions of the Constitution concurrently with the general election for State Delegates in 1938. Nominating petitions to fill vacancies in the office of State Delegate must be filed not later than February 25, 1938.

EDWARD T. FAIRCHILD,
Chairman Board of Elections

Assembly

(*Continued from page* 844)

2. That such Special Committee of the Association be authorized, under the supervision of the Board of Governors, to appear before, and to assist in any way that may be requested, the Special Committees created by the recent session of the United States Senate and House of Representatives, to study and report as to the judicial system of the United States;

3. That in the event that substantial changes affecting the Supreme Court or other Federal Courts are proposed and under serious consideration at a future session of the Congress, a referendum vote of the membership of the Association shall be taken, pursuant to Article X, Section 5, of the Constitution of the Association, upon such proposals; and that the results of such referendum vote shall thereafter constitute the instructions of the Association to such Special Committee; and

4. That your present Special Committee on the Supreme Court Proposal be discharged.

The resolutions offered by Mr. Smith were adopted without opposition, and marked one of the most significant steps taken by the 60th annual meeting.

Mr. Walter P. Armstrong, of Tennessee, Chairman, presented the report of the Committee on Jurisprudence and Law Reform, printed in the Advance Program.

He thereupon offered the first resolution, which recommended that the allowance to United States Circuit and District Judges for expenses when holding court otherwhere than at their place of residence be restored to $10.00 per day. This was adopted unanimously, as was the following resolution, favoring the enactment of Senate Bill 1625, allowing District Judges to appoint official stenographers, provided it be so amended as to permit the Judge to fix the compensation within maximum and minimum limits specifically set out.

Method for Removal of Federal District Judges

The third resolution was "that the Association approves H. R. 2271 providing a method for the removal of District Judges, provided it be amended so as to provide for a court of seven circuit judges and to allow an appeal in all cases on questions of law, and on questions of fact where two judges dissent as to material and controlling facts."

Chairman Armstrong then said:

"I think that recommendation probably requires some explanation. You will recall that Article II, Section 4, of the Constitution provides as follows:

That the President, Vice President and all civil officers of the United States may be removed from office on impeachment for and conviction of treason, bribery, or other high crime and misdemeanor.

"Article III, Section 1, provides:

That judges, both of the Supreme and inferior courts, shall hold their office during good behavior.

"In other words, the one provision provides for impeachment for high crimes and misdemeanor; the other for holding office during good behavior. It is the opinion of the committee—and, I may add, also of the Chairman of the House Judiciary Committee, Chairman Sumners, who has made an elaborate study of this question—that there is a hiatus between the two provisions; in other words, that a judge may be subject to removal when he doesn't measure up to the standards of good behavior even though not guilty of high crime and misdemeanor, but that is not the immediate object of the recommendation.

"There are two bills pending in Congress, one introduced in the Senate by Senator McAdoo, and one in the House by Chairman Sumners. The Senate bill provides that District Judges and, indeed, I think Circuit Judges also—all but Justices of the Supreme Court—may be tried by a committee composed of

eleven senior Circuit Judges, and provides for appeal to the Supreme Court. The House bill provides for a court of three Circuit Judges selected by the Chief Justice of the United States, and also for an appeal. Our recommendation is in line with them, but not in accordance with either of the bills.

"Our thought is that a court of eleven is too large, and a court of three too small; that a court of seven would be the proper size, and appeal should be allowed to the Supreme Court of the United States not only on questions of law, but on questions of fact when as many as two circuit judges dissent.

Would Remove Cases from Political Arena

"Neither of the bills attempts to take from the Senate the right to try impeachment cases. It is merely an additional machinery, and the reason we think it desirable is this: that in impeachment cases, not only is the time of the Senate encroached upon but many Senators don't have time to go in and listen to the evidence, and we think the Circuit Judges are better qualified and have a better opportunity to hear the testimony and pass upon the questions presented. Our real reason for making this recommendation is that we think it makes for a continued independence of the judiciary and tends to remove those cases from the political arena. We believe that the Senate will welcome the bill and welcome the relief which it will bring to it in not having to try impeachment cases."

Mr. Morton John Barnard, of Illinois, was heartily in sympathy with the purpose of the resolution, but did not believe that dissent on the part of the judges should be necessary in connection with any appeal. He therefore moved an amendment eliminating dissent on the part of the judges as a prerequisite for appeal. Chairman Armstrong said he had no particular objection to the amendment. However, it was the thought of the committee that when seven circuit judges concurred, it was unnecessary to burden the Supreme Court of the United States with a rehearsal and a review of the questions of fact. He quite agreed that when a judge was on trial, both his own personal interest and the public interests demanded that every safeguard be placed around him, but he felt that when seven judges concurred unanimously on questions of fact, it was unnecessary to burden the Supreme Court with the matter.

Mr. John G. Buchanan, of Pennsylvania, offered another amendment to provide that appeal on questions of fact might be had where any judge dissented as to material and controlling facts. Mr. Barnard's amendment was put to a vote and failed, whereupon Mr. Buchanan's amendment was adopted.

Chairman Armstrong next presented a resolution "that the Association disapprove H. R. 5755 purporting to amend the Federal Employers' Liability Act as now drafted." The committee, he said, had not considered the substantive part of the bill, but the remainder of the measure provides a peculiar kind of procedure, all of which is now covered by the proposed new rules of civil procedure. The committee thought it would be unfortunate to single out one class of cases and prescribe the method of procedure, pending the consideration and probable promulgation of these rules. The recommendation was adopted.

A further resolution was as follows: "RESOLVED That the Association approves the Rules for Civil Procedure of the District Courts of the United States, as reported by the Advisory Committee on Rules for Civil Procedure as of April 30, 1937, and RESOLVED, further, that the Association recommends that said Advisory Committee be continued, that all appeals from District Courts be as provided in Rule 63 of said Rules, and that as a condition precedent to the promulgation of rules by a district court the concurrence of a majority of the circuit judges of the circuit in which the district court is located should be required."

By way of explanation, Chairman Armstrong stated that under the Act, if the rules are to go into effect soon, they must be adopted by the Court, prior to the convening of the next Congress, and then filed with the Congress by the Attorney-General, and even with that they cannot become effective until the adjournment. This was the last opportunity the Association would have to approve the rules, as now drafted, if they are to go to the next Congress. He then touched briefly on all the other recommendations in the resolution. The first was that the Advisory Committee be continued, and the recommendation was made because it was felt that the court should have the continued benefit of the experience of the Advisory Committee.

The next recommendation was that appeals from the District Courts be the same in all cases. "The appeal from the District Courts to the Circuit Courts," he said, "is governed by the new rules, if adopted, from the District Courts to the Supreme Court, by the rules of the Supreme Court of the United States." The committee had some hesitancy in suggesting to the Supreme Court that it modify its own rules, but it thought the method should be uniform and that the method recommended by the Advisory Committee is preferable.

Proposal as to Rules by District Judges

The only other recommendation was in regard to rules by District Judges. There are two alternative rules in the report of the Advisory Committee, he said. One simply authorizes the District Judges to make rules, and the other requires the concurrence of a majority of the Circuit Judges. The committee thought there would be more uniformity and also a better chance of getting acceptable rules if the District Judges had the advice of the Circuit Judges. He added that the Advisory Committee was against that recommendation.

Mr. Harry N. Gottlieb, of Illinois, thought the report of the committee was based on a mistaken assumption that the most recent draft of the rules was final. However, the Advisory Committee had invited suggestions and expected to get and consider them. He had in his hand a printed report containing thirty-nine or forty pages embodying the suggestions of the Chicago Bar Association and the Illinois State Bar Association and, to judge from previous experiences, it was quite possible that some of them would be adopted. No doubt the committee was also receiving numerous suggestions from other quarters.

He thought the action of the Association would be weakened if it was predicated on the second publication as a final draft and the Advisory Committee saw fit to change it in many details, although these would probably not affect the general tenor and substantial principles of the rules. He therefore moved that the resolution be amended by the addition of the following words: "Subject to such modifications as the Advisory Committee may deem it advisable to adopt after a consideration particularly of suggestions submitted by the Bar in response to the invitation of the Advisory Committee."

After some further discussion, Chairman Armstrong said he had no objection to Mr. Gottlieb's substitute and the same was adopted.

Third Session of Assembly—Addresses by Hon. Hatton W. Sumners, Chairman of Judiciary Committee of House of Representatives, and Robert M. Hutchins, President of the University of Chicago

THE Music Hall is again crowded, to hear the addresses of Hon. Hatton W. Sumners, Chairman of the House Judiciary Committee, and Mr. Robert Maynard Hutchins, President of the University of Chicago. Former President Sims presides and introduces the speakers. Chairman Sumners does not disappoint those who are expecting a significant and challenging utterance from him, in defense of the basic principles of our constitutional government. President Hutchins holds the attention of the audience while he speaks on "The Bar and Legal Education."

THE third session of the Assembly was called to order by former President Henry Upson Sims, of Alabama. In introducing Hon. Hatton W. Sumners, the first speaker of the evening, he said:

"It was announced some time ago that Mr. Justice Van Devanter, recently retired from the Supreme Court, would be in Kansas City to address you this evening. A telegram received a few days ago announced that he was unable to come. Therefore, the President of the Association prevailed upon a gentleman no less revered than Mr. Justice Van Devanter although very much younger, I am proud to say a gentleman from the Gulf states, my part of the country, to address us. The Honorable Hatton W. Sumners, Chairman of the Judiciary Committee of the House, a member of Congress from Dallas for twenty-five years, has been here mingling with his friends all of the week, indeed, during part of last week. But he is always so full of ideas, and he knows so well how to interest Americans in all sorts of ways, that we have prevailed upon him to give us some of his time, taking the place of Mr. Justice Van Devanter before us this evening.

"Those of you who don't know, should know that Mr. Sumners was born in Middle Tennessee. He moved to Texas, I suppose on one of those treks made by misguided persons who thought that Texas was a better state than the nearer Gulf states. But he was so completely welcomed out there that he remained and has come to the top of the community.

"He has been on the Judiciary Committee of the House of Representatives a great many years, and since 1930 he has been Chairman of that Committee. In fact, he knows all about the House—what it has done and ought to do. Ladies and Gentlemen, I have the honor of presenting to you the Honorable Hatton W. Sumners, member of Congress from Dallas."

Hon. Hatton W. Sumners Delivers Address

The audience rose and applauded. Judge Sumners thereupon delivered his address, delightful and entertaining in tone but serious and significant in content and purpose. It is printed elsewhere in this issue.

Chairman Sims then introduced Mr. Robert Maynard Hutchins, President of the University of Chicago.

"About ten years ago," he said, "word came over the country that a young man, named Robert Maynard Hutchins, had been made President of the great University of Chicago. People were surprised. He was just thirty years old. They understood that he was living at Berea College, Kentucky. There had already been noised through my part of the country, the South, and the middle part of the United States and the great West, the great work that his father had been doing there in Berea College. We didn't realize what a short time his father had been there in developing Anglo-Saxon sturdiness and the right sort of education among those people.

"And this young President came from Berea College, in the opinion of most of us. The people said, in my part of the country, except those familiar with what is going on among the educational world of the colleges, 'What, shall a prophet come out of Nazareth?' It turned out afterwards that he had merely lived in Nazareth for a short while, that he really came from Brooklyn, presumably, a very learned place, that he had been educated at Oberlin College for a few years in his early infancy, and that he had sat at the feet of those great men in Yale.

"I knew because I had been to Yale while he was acting dean and dean of the law school—he had been there for a year or two trying to modernize the Yale Law School after Dean Swann had given up trying to make it the equal of Harvard and had retired. I also knew that Dean Hutchins thought it was rather a hard job to make out of Yale what he wanted to make out of it. So he went over to Chicago in a newer field with less crustiness around it, and naturally more agreeable to him, coming as he did from the fresh, blooming, central part of the South.

"President Hutchins, as a matter of fact, has some very old ideas. As I gather from his articles, he believes, as a good many of us believe who are old enough to be his father, that the best education is to study Latin, Greek, German, Spanish, Italian, mathematics, philosophy and study it hard, but, to my great surprise, as I found from reading his last article he doesn't seem to think it is necessary to study the Greek in original. I have no doubt he can tell you why.

"President Hutchins, it is with great pleasure that the American Bar Association greets you, and we greatly appreciate your coming to address us."

President Hutchins prefaced his formal address with this:

"Fellow Members of the American Bar: You know Mr. Sims as well as I do. In view of the fact that I am to take a train at eleven o'clock, I know you will not expect me to take the time now to correct the inaccuracies of his introduction. However, I will say that this is the first time in a long and painful career in education that I have ever heard Yale and Harvard Law Schools so much as mentioned in the same breath." (Laughter).

He then read his address, which will appear in the December issue. The Assembly thereupon adjourned.

Fourth Session of Assembly—Winning Essay in Ross Contest Read—Resolutions Committee Reports on Numerous Resolutions Presented by Members at First Session—Lively Debate in Several Instances—Discussion of Resolutions Bearing on Justice Black's Appointment Goes Over to Next Session

IT is "Resolutions Day" in the Assembly. Everyone who wished to bring any matter to the attention of the Assembly was given the opportunity to offer it in the form of a resolution at the first session. The Resolutions Committee, under the chairmanship of Judge L. B. Day, of Nebraska, has been steadily at work on these resolutions, giving proponents and opponents alike an opportunity to be heard. It now presents its report. There is a full attendance and lively discussion of several of the Committee's recommendations. Resolution dealing with the recent appointment to the Supreme Court was referred to Committee, along with a further resolution calling on the United States Senate to provide public hearings on the qualifications of nominees for judicial office—with instruction to report on following day. Resolution that, in cases involving constitutionality of Federal statutes, Courts should accept the opinion of a minority that it is constitutional as an objective standard of reasonable doubt, is reported on adversely. The discussion carries over to next session, where the resolutions and majority and minority reports are referred to the Special Committee on Proposals Affecting the Supreme Court. Other resolutions presented, discussed and disposed of. Resolutions Committee's recommendations generally followed. Before all this happens, however, Mr. Elwood Hutcheson, winner of the Award in the Ross Essay Contest for 1936-37, is presented and reads selected portions of his paper. Recommendations of Commerce Committee debated but not all are adopted.

HON. WILLIAM L. RANSOM presided over the deliberations of the Assembly at its fourth session. He announced that the first business before the meeting was the formal award of the prize in the Erskine M. Ross Essay Contest and briefly explained the origin and purpose of the contest.

He thought all would realize the extreme timeliness and importance of the subject submitted to the contestants, which was "The Administration of Justice as Affected by Insecurity of Tenure of Judicial and Administrative Officers." The selection of the winning essay had been made by a distinguished board serving on behalf of the Association and their report had been made to, and accepted by, the Board of Governors.

When the essays for this year were examined, he continued, it was found that the prize for the 1937 contest was to be awarded to a relatively young man, a lawyer in general practice in the town of Yakima, in the State of Washington. He thought the representative character of the Association was indicated by "what takes place in this contest, as in other respects. Last year the prize was won by a lawyer who is in one of the great offices of New York City; this year the prize is won by a graduate of the University of Washington and its law school, a lawyer engaged in general practice in one of the smaller cities of the State of Washington."

Successful Ross Essay Contestant Reads Winning Paper

He thereupon presented Mr. Elwood Hutcheson, the winner of the 1937 contest, who read portions of his address. At its conclusion, the Chairman presented to him the customary certificate, duly executed by the officers of the Association, and also the check of the Association for $2,000.

Chairman Ransom then announced that, pursuant to the terms of Judge Ross's will, the Association had selected as the topic for the 1938 contest, "The Extent to Which Fact-Finding Boards Should be Bound by Rules of Evidence." The essay, he added would be restricted to 5,000 words, including quoted material and citations in the text. Footnotes might be used and would not be counted as part of the essay, but excessive documentation and footnotes might be penalized by the judges. By reason of accretions to the principal fund of the Ross bequest, the amount of the prize for the essay in 1938 would be larger than in 1937, $3,000. Further announcement of the terms of the contest are in this issue of the AMERICAN BAR ASSOCIATION JOURNAL.

The report of the standing Committee on Noteworthy Changes in the Statute Law, of which committee Mr. Karl L. Llewellyn is chairman, contained no recommendations and was therefore received and filed. Next on the calendar was the report of the Standing Committee on Commerce, which had been printed in the Advance Program, and Chairman H. J. Gallagher, of New York, was recognized to present its specific recommendations for consideration.

Standing Committee on Commerce Presents Report

Chairman Gallagher thereupon presented resolution No. 1, to the effect that the American Bar Association reaffirmed its approval of the public purposes and general principles of S. 5 providing for a revision of the Federal Food and Drug Act, but recommended that the bill as passed by the Senate of the 75th Congress be amended to provide for an impartial administrative board of review, independent of the Department of Agriculture, to review any decision by the Secretary of Agriculture to institute a criminal prosecution or a civil penalty proceeding with respect to an "opinion representation." The committee did not think that the Secretary of Agriculture should review its own decisions. He therefore moved the adoption of the resolution, which was unanimously carried. The same action was taken with respect to the resolution in which the Association urged the enactment of a Federal Sales Act in substantially the form of H. R. 7824 now pending, and directed the Committee on Commerce to use

its efforts to secure the passage of the bill with such further amendments as seem proper.

The next recommendation was that the Association authorize the Committee on Commerce to aid and cooperate with any commission or governmental body undertaking a survey of the anti-trust laws, and urge that the principles respecting anti-trust legislation approved at the 1935 meeting of the Association be incorporated in any legislation recommended to the Congress. The Attorney-General of the United States, the Chairman explained, had recommended a study of the anti-trust laws by a new commission and, under the circumstances, the committee believed any specific recommendation for its modification would serve no purpose. It felt, however, that the Bar Association should be specifically instructed to cooperate with any such commission so established. The resolution was adopted.

Recommends Government Take Its Own Medicine

The next recommendation was that the Association disapprove the enactment of the Davis Bill, S. 1730, exempting sales made to the Federal government, State governments and charitable organizations from the provisions of the Robinson-Patman Act. The committee felt that if there was any basis for the provisions of this act, prohibiting discrimination among sellers, such prohibition should apply equally to the Government and that the Government should set an example to its citizens by abiding by its own laws. The resolution was thereupon adopted.

The sixth recommendation dealing with the Miller-Tydings Bill, permitting the maintenance of retail prices, was withdrawn, as the bill had passed and had been signed by the President. The next recommendation caused considerable discussion, which led to adverse action by the Assembly. It was to the effect that the American Bar Association recommend the enactment of the Pettengill Bill (H. R. 1668) repealing the Long and Short Haul clause contained in Section 4 of the Interstate Commerce Act, or, in the alternative, the enactment of a measure which would restore said section to the form in which it was prior to the effective date of the Mann-Elkins amendment of June 18, 1910. The purpose of the bill, he stated, was to place the railroads of the country on an equal footing with other competing forms of transportation. The railroads had alone been singled out in this provision against a greater charge for a short haul than a long haul in the same direction. In view of the importance of the railroads as the main transportation means of the country and the loss to which they had been subjected in the last few years, the committee thought they were entitled to this relief.

Louisiana Member Oppposes Recommendation

Mr. George H. Terriberry, of Louisiana, said that he was not a traffic expert and he would not therefore discuss all of the consequences that might arise by enactment of the Pettengill Bill by Congress. As far as New Orleans was concerned, it wanted all methods of transportation to prosper. However he had heard a good deal about this proposed measure from shippers and carriers and they were very fearful of the consequences of its adoption. The great water carriers between the Pacific seaboard through the Panama Canal to the Gulf of Mexico and the Atlantic, felt that it would place an instrument for their destruction in the hands of the railroads, after which the railroads would have the shippers of the country at their mercy.

He wondered if the lawyers of the Middle West realized what might be the consequence of the passage of this legislation to their shippers. This proposal, and several other measures recommended by other committees, had led him to think that the American Bar Association might very well ask the Board of Governors to study just what were the proper subjects for the Bar Association to consider and how far it ought to go. He moved to lay the recommendation on the table and the motion was seconded.

Chairman Ransom trusted the House would permit the Chair to say a word in justice to the committee. He read Section 7 of Article X of the Constitution, as to the powers and duties of the committee, and said he felt sure that all would realize that it was within the province of the committee, under the fundamental law of the Association, to make the recommendation, and that thereupon the House was entitled to decide whether it would or would not approve a particular recommendation.

Chairman Gallagher then presented the resolution of the committee, that the Association recommends that the Wheeler Anti-Basing-Point Bill (S. 1581) to amend the anti-trust laws by making it unlawful to employ the basing-point system of pricing goods shipped in interstate commerce, be not enacted by the Congress. The effect of this bill, if adopted, he said, would be to create a monopoly in a particular locality in favor of an industry in that locality and make it impossible for manufacturers at a distance to compete with it. He moved the adoption of this resolution. A vote was taken and a division called for, which showed that the committee's recommendation was approved.

Another Recommendation Disapproved

Chairman Gallagher then presented a resolution that the Association disapprove the enactment of S. 1261 amending paragraphs (3) and (4) of Section 15, Part 1, of the Interstate Commerce Act. The effect would be to give the Interstate Commerce Commission the unrestricted right to establish through routes between railroads. So far as he could see, the main argument for the bill was that, if adopted, it would permit the Interstate Commerce Commission to establish a through route over a short line railroad, which might be temporarily or permanently in financial difficulty, in order that it might secure additional revenue. The Interstate Commerce Commission already is empowered to initiate through routes on the request of any shipper, and the effect of this bill would be merely to divert traffic from the railroad which originates it and over which it naturally moves and permit it to be short hauled, which cannot be done under the existing decisions of the Supreme Court. It seemed to the committee that the public interest required the stabilizing of railroad earnings as far as possible and not to force any more carriers into insolvency proceedings. He did not think that while opinion was being crystallized in this country, the legal profession should sit idly by and say nothing.

Mr. C. A. Beardsley, of California, said that he felt competent to speak upon the subject as he knew absolutely nothing about it. It seemed to him that the Association should bear in mind that it had a sizeable job of its own. This proposal fell exactly into the same class as that relating to the long and short haul

clause, and he moved that it be laid on the table. The motion was seconded and passed.

Report of the Resolutions Committee Is High Spot of Meeting

Chairman Ransom announced that the Assembly was now coming to one of the most interesting features of the meeting, the report of the Resolutions Committee, which is an important part of the new structure of the Association, in that it ensures to every member an opportunity to present, and have a fair and open hearing upon, any resolution embodying his views. During the past few days, when others of us were going about perhaps more enjoyable pursuits, Chairman Ransom said, this committee had been engaged in holding hearings and in considering resolutions that had been filed. He was sure that all were grateful to the Chairman, Judge L. B. Day, of the Supreme Court of Nebraska, and his colleagues, who had done the work of the committee so effectively.

Judge Day was recognized and presented the report. By way of preliminary, he stated that the committee had held several meetings and had given a hearing to proponents and opponents of the resolutions referred to, who desired to present their views. It had investigated each subject matter as well as possible during the meeting. He then presented resolution No. 1, offered by Mr. Eugene Quay, of Illinois, which would provide that no change in the Canons of Ethics be given effect hereafter until it had been approved either by referendum of the members of the Association or by vote of the Assembly at two successive annual meetings, as well as by the vote of the House of Delegates. In the opinion of the committee, the Chairman stated, this resolution ran counter to the Constitution and By-laws, in that it would attempt to curtail the powers granted to the House of Delegates. The House already had the power to conduct such a referendum, if it chose to do so, and the committee believed that the decision could safely be left to it. It therefore recommended that the resolution be not adopted and the House immediately adopted that recommendation.

The two following resolutions, offered by the same member, met a similar fate. The first was that the House of Delegates should be requested to adopt a schedule of requirements to be met by any association before its request for representation in the House can be considered, and that it include in such schedule of requirements that the standards for admission to its membership shall be at least equal to those of the American Bar Association. Chairman Day stated that the Constitution provided that the House of Delegates held the power of approval and disapproval and the proponent of the resolution had failed to convince the committee of any necessity for fixing further requirements.

The next resolution called for the appointment of a special committee to study and report on the practical operation of the administrative clauses of the new Constitution and By-laws and to submit draft of any modifications found necessary or desirable. No specific modifications, the Chairman stated, were urged as desirable, and there was already in existence the Committee on Rules and Calendar of the House, having jurisdiction to consider such proposals.

The next resolution, also by Mr. Quay, was to the effect that the membership of the Association disapproved of efforts to extend the definition of practice of law so as to include acts for which it has never been customary to employ a lawyer. The Chairman stated that there was a Standing Committee of the Association to study this subject and the Resolutions Committee suggested that it be referred to the Standing Committee on Unauthorized Practice of Law, which was done.

Resolution Favoring Code of Uniform Marriage and Divorce Laws

Chairman Day then presented a resolution, offered by Mr. Edward T. Lee of Illinois, that the Association place itself on record as favoring a code of uniform marriage and divorce laws, and that a special committee of the Association be formed looking to that end to be known as the Committee on Uniform Marriage and Divorce Laws. Judge Day stated the committee favored Uniform Marriage and Divorce Acts, but in order to avoid duplication of effort, recommended that the resolution be referred to the Commissioners on Uniform State Laws, who have been studying the problems for several years, incident to the preparation of a Uniform Act, and have had a committee working on the subject.

Dean Lee said that the Commissioners had been considering the matter for several years but had gotten nowhere with it. He gave some illustration of the present unsatisfactory conditions of the laws of marriage and divorce in various States, and the frauds and evasions to which they gave rise, and declared that the situation had brought heavy criticism of the legal profession.

Mr. Mayer C. Goldman, of New York, said that the failure to handle this important question constituted a reproach to our administration of justice, and he therefore thought the recommendations of the committee should be defeated. Mr. Lowell Matthay, of California, closing for the Resolutions Committee, said that the committee did not have an opportunity to study the resolution at any great length. It did ascertain, however, that the Commissioners had an active committee on the subject, and its feeling was that, before proceeding to appoint an Association committee to take this matter out of the hands of the Commissioners, it would be well to ascertain the exact state of its work on the subject. He believed if the proponent of the resolution would confer with the Commissioners and then advise the Association whether there was prospect for the preparation of a uniform draft, the Assembly could act more intelligently.

The committee's recommendation for reference to the Commissioners was thereupon adopted. Chairman Day then presented a resolution offered by Mr. Elmer G. Van Name, President of the National Association of Law Schools, to amend the Association's standards with respect to law schools so as to require, among other things, the successful completion of a course in the Constitutional law of the United States and of the particular State or jurisdiction in which the school is located; that all regular members of the faculty shall have been admitted to the Bar prior to appointment; and that no less than sixty percent of the regular members of the faculty shall have been engaged in the practice of law for at least five years prior to appointment. The committee, the Chairman stated, commended in principle the proposal that all law students should take a course in Constitutional law, but was of the opinion that it was undesirable for the Association to specify the courses which a school must teach or the conditions under which they must be taught, or arbitrarily to specify a period of practice for faculty members prior to their appointment. It recommended that

the resolution be not adopted, and the recommendation was approved.

Resolution Applying "Full Faith and Credit" in Educational Field

The next resolution, also offered by Mr. Van Name, was that the Association approve "all the law schools, in the various States of the United States, which have adopted the two-year college requirement as prerequisite to the study of law, and which schools now comply with the standards of this Association"; and further, that "in the application and interpretation of this resolution, full faith and credit shall be given the official acts, rulings and interpretations of the duly constituted authorities in the respective jurisdictions which have adopted the said two-year college rule." The Committee however, was of the opinion that the question whether a school had met the Association's standards was one of fact to be determined by the duly constituted agency appointed by the Association for that purpose; also that the agency appointed to inspect and approve law schools was empowered to act only under the standards the Association had provided and not under the acts and rulings of agencies beyond its control. It recommended that the resolution be not adopted and the Committee was sustained.

The next resolution, offered by Mr. Elmer G. Van Name, was that "all statements, rulings and interpretations of Association policies and other similar action heretofore issued or taken in the name of this Association, by any or all sections of the Association and their respective councils, and not ratified or approved by the House of Delegates since August 24, 1936, be and the same are hereby revoked, withdrawn and repealed." The proponent of the resolution stated, when submitting it to the Committee, that it was a correlary to the repeal of the old constitution and to the spirit of the new one limiting the power of the Sections to speak for the membership at large. The Committee was of the opinion that the rulings and interpretations made by the Sections and their Councils constitute a basis and guide for their actions, and that the Association did not intend to wipe them out in its reorganization program. It recommended that the resolution be not adopted. Carried.

For Investigation of Sources of Income of Law Enforcement Officials

The next resolution, offered by Mr. Joseph T. Harrington, of Illinois, after an appropriate preamble, called for the appointment of a Special Committee to investigate the source of income of public officials charged with the enforcement of the law, for the purpose of ascertaining "why they spend more money to be elected to their position or office than the total amount of salary received while holding their said term of office." The Committee reported that its opinion was that unreasonably large expenditures for campaign and election purposes, by candidates for law-enforcement offices are inimical to good government. It believed, however, that such matters can be dealt with more effectively under the Corrupt Practice Acts in force in most jurisdictions. For this reason and the further one that the Association has no facilities for making an adequate survey of the kind contemplated in the resolution, it recommended that it be not adopted.

Mr. Harrington made quite a spirited talk in support of his resolution, referring frequently to conditions in Chicago.

Mr. Raymond Young, of Nebraska, closed in behalf of the Resolutions Committee. Its thought was that the Association was in no sense an inquisitorial body, that it had neither the means nor the facilities to conduct such an investigation, and that if the Association consumed its energy and substance in a vain attempt to perform the duties of those who were primarily charged with responsibility, it would soon lack the means to accomplish the worthy objectives within its reach. For these reasons and not because of any lack of sympathy with the spirit of the resolution, the Committee urged that it be not adopted. Judge Hartshorne, of New Jersey, wished to propose a substitute resolution, and was given unanimous consent to be heard. Chairman Ransom called for the resolution in writing and suggested that, in order to give Judge Hartshorne the opportunity to draft and submit it, the original resolution, with the Committee recommendation, be passed over for the present. This was done.

Radio Broadcasting and Photographs in Court Rooms

A resolution, proposed by Mr. Fabius T. Finch, of California, was next taken up. It was that "it militates against the dignity of court proceedings and the respect which the general public holds for Courts to allow radio broadcasting equipment to be installed in Courts to broadcast judicial proceedings or to allow photographs to be taken of litigants or witnesses in courtrooms or in the halls or ante-rooms under the control of the Courts, and the American Bar Association recommends that these practices be discontinued." Chairman Day said:

"This subject has been under consideration by the Special Committee of the Association on Cooperation Between Press, Radio, and the Bar, as to publicity interfering with fair trial of judicial and quasi-judicial proceedings, cooperating with Committees of the American Newspaper Editors and the American Newspaper Publishers Association. These three Committees have submitted to this meeting a most interesting and constructive report dealing comprehensively with undignified and prejudicial publicity relating to trials. By resolution adopted Monday by the House of Delegates, our Special Committee has been continued, with instructions to confer further with the Publishers' and Editors' Committees on the subject matter of the proposed resolution.

"Moreover, the standing Committee on Professional Ethics and Grievances has recommended to this meeting the adoption of two new Canons of Judicial Ethics, one of which reads:

"'Improper Publicizing of Court Proceedings. Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room, during sessions of the court or recesses between sessions, and the broadcasting of court proceedings are calculated to detract from the essential dignity of the proceedings, degrade the court and create misconceptions with respect thereto in the mind of the public and should not be permitted.'

"That recommendation will come before the House of Delegates and the Assembly on Thursday. As the Resolution before us would duplicate what is already on the agenda, it is recommended that it be not adopted."

At the conclusion of these remarks the Committee's recommendation was unanimously carried.

Chairman Day then presented a resolution offered by Mr. A. M. Evans, of Missouri, to the effect that an opportunity for a hearing in civil causes by a Federal Court be accorded a Federal citizen as a matter of

right. The proponent of the resolution stated that he referred to cases passed upon by a State Supreme Court, when procedure is now by petition for certiorari, with no right to an appeal. The Committee pointed out that this involved questions of jurisdiction, practice and procedure in the Federal courts, all of which had been under consideration for a long time by the Bench and Bar. It could see no necessity for the passage of a resolution by the Association on the subject, and recommended that it be not adopted. Recommendation approved. The following recommendation, the Chairman stated, dealt with liability for injuries to persons resulting from the operation of aircraft, and opposed legislation forcing a rule of absolute liability for such injuries, regardless of whether they were caused through negligence, unavoidable accident or vis major. The subject had been given the careful consideration of the Committee of the National Conference of Commissioners on Uniform State Laws, the American Bar Association and the American Law Institute. After extended hearings, these committees had prepared a draft of a uniform law imposing absolute liability but limiting the amount of recovery for specific injuries to persons. This question required inquiry by persons expert in the field of aeronautical law, and the Committee did not believe the Association should attempt to overrule the deliberate conclusions reached by these Committees. It therefore moved that the resolution be not adopted. Carried.

For a Department of the Professions

Chairman Day then presented a resolution offered by Mr. Isidor Lazarus, of New York, "1. That the American Bar Association recommends favorable consideration, by the Congress of the United States and other appropriate law-making bodies, of the establishment of one or more governmental departments of the professions, with powers and duties modeled in such field or fields upon the Federal Departments of Agriculture, Commerce and Labor. And (2) That the American Bar Association recommends in the alternative that the proper lawmaking bodies give favorable consideration to the expression of the powers and duties of the Federal Department of Justice so as to include therein a service, in and about the vocation and functioning of the machinery of justice, analagous to the service now rendered by the Departments of Agriculture, Commerce and Labor in those respective fields."

The committee's comment was as follows:

"This Committee has given careful consideration to this resolution. We do not look with favor upon the establishment by the Congress of the United States, or by the legislatures of the several States, of any department which shall have the powers and duties over the Bar or any other profession that are exercised by the Department of Agriculture or the Departments of Commerce and Labor in their respective fields.

"Studies of the economic conditions of the Bar are being made by a special committee of this Association. Studies of the administration of justice in the Federal System are constantly being made by the Department of Justice, and the conferences held by the Chief Justice with the Senior Circuit Judges, and are the subject of annual reports by the Attorney General. Studies of the administration of justice in the several states are being constantly made by the judicial councils, and are the subject of annual reports of such councils. We therefore recommend that the resolution be not adopted."

Mr. Lazarus, speaking in support of the resolution, said:

"I have the greatest respect for the Committee on Resolutions and its deliberate opinion, but it is only natural when something new is proposed that the matter be slightly misunderstood with the best of intentions. There is one remark of Judge Day which in an intellectual and not a personal way I take exception to particularly and that is the statement that we do not want any government department to have power over us. Well, that is not the purpose of the resolution, and if it is I want you to correct it. I think it would be fatuous to say that the United States Department of Commerce has any power over the United States Chamber of Commerce or the businessmen of this country. I, too, am jealous of our independence and that is one reason why I propose this resolution.

"When the business men of this country want to know where they can sell more goods so as to keep up production and payrolls and purchasing power and prosperity, they don't rely on their narrow, limited resources to gather this world-wide information, but the Department of Commerce as a purely mechanical research proposition will tell the business men of this country what are the needs in South America and in Africa and in different parts of this country. . . .

"I am not inviting rule over us, I am inviting purely scientific, efficient research service by the Government of the United States through one of its departments or a new department, to supply additional material to the splendid committees and commissions which we have."

Resolution by Mr. Tullis, of Louisiana

The question was put to a vote and the committee's unfavorable recommendation was adopted. A resolution offered by Mr. Robert Lee Tullis, of Louisiana, was next taken up. It read: "Resolved: That it is the sense of this Association that membership in a secret oath-bound order, actuated by religious and racial animosity, is incompatible with membership in the Supreme Court of the United States and that the relevant facts in regard to the latest appointee to that high post should be ascertained by an impartial committee of five, created by this Association."

"This resolution," Chairman Day stated, "proposes that the Association create a committee to investigate the facts regarding the appointment of an Associate Justice of the Supreme Court of the United States, made by the President and now confirmed by the Senate. There is nothing now pending in respect to which the Association could take any effective action if it undertook the inquiry proposed. It is therefore recommended that the resolution be not adopted."

Mr. Tullis then moved that the resolution be amended by striking out everything following the words "Supreme Court," thus eliminating the provision for an investigation. Chairman Ransom stated that as Mr. Tullis was the author of the resolution, he would be permitted to change it without a vote, unless there were objection. Objection to allowing Mr. Tullis to amend his resolution after report by the Resolutions Committee, was made by several members; and a vote taken, which resulted in the allowance of the amendment. The question then recurred to the original resolution as amended. Chairman Day stated, in response to an inquiry by the Chair, that the committee's recommendation also applied to this.

Mr. Lessing Rosenthal, of Illinois, thought the resolution in its present or its original form was rather unfortunate. But he also thought, in view of what had gone on, particularly in view of the fact that the Senate would not accord a public hearing, not only on

the matter of the Ku Klux Klan, which was merely an incident, but on any question that might properly be brought before it, that there was an absolute necessity that the Bar Association take some action. The refusal of the Senate to afford a hearing on the question of the qualifications of a Justice—and he was not referring only to a single instance—showed the danger which the country might incur by tolerating such procedure. He therefore moved as a substitute for the Tullis resolution as amended the following:

For Public Hearing on Judicial Nominees

"Resolved: That the Senate of the United States be petitioned to establish an appropriate rule requiring all nominations for judicial office to be referred to a proper committee, and that such committee shall in every instance afford the people under suitable regula tions an opportunity to be heard."

Chairman Ransom ruled that the substitute was not germane to the original resolution, on which the Resolutions Committee had held hearings and made a report; that it proposed a matter on which there had been no hearings and no report; and that it proposed action substantially different from that set forth in the original resolution. So, the Chair ruled, the Rosenthal resolution, under the provisions of the Constitution, must be referred to the Resolutions Committee. Mr. Frank J. Hogan appealed from the decision of the chair, and the chair was sustained. Mr. Guy Richards Crump of California, then moved that the original resolution, the amended resolution, and Mr. Rosenthal's substitute, be referred to the Committee on Resolutions with instructions to report tomorrow. At this point a motion was made that the whole matter be indefinitely postponed, but this was voted down. The question then was on the motion to refer. Mr. Hay, of Missouri, was recognized and spoke as follows:

"I rise, gentlemen, to support the motion to refer this to the Resolutions Committee for immediate consideration. The reason I favor that, gentlemen, is this. There is no use for us to try to deceive ourselves. We are dealing with a very sensitive proposition, a proposition on which a hastily considered vote by this Association might inflict grievous wounds either way we vote. If there ever was a resolution or a general subject that should receive the careful consideration of this Association's committee, this is the sort of a resolution.

"I was impressed by the resolution offered by the distinguished gentleman from Illinois. I think the substance of that resolution represents perhaps the objective that everyone has in mind looking toward future action. I think we want to do nothing here that will any further muddy the waters in America or lead to any further bitterness amongst our people. I speak feelingly, gentlemen, about the effect of the agitation of the issue which lies behind all this. I perhaps suffered from the agitation of that issue years ago as much as any man in Missouri. . .

"In God's name, let's not have the members of this Association contribute anything to any further bitterness. I hope that this will be referred to the committee so that at some convenient hour this afternoon we may report back and you may have the judgment of the committee as to what action should be taken. I therefore would like to amend the motion to refer to the committee with the further provision that the committee be requested to report at four o'clock this afternoon."

At this point the Rosenthal substitute, which had been ruled not germane, was referred to the Resolutions Committee as a matter of course by the Chairman, and a resolution was adopted that the Resolutions Committee give the Tullis resolution, the amended resolution, and the substitute, the earliest possible consideration and report to the Assembly at the next session.

The next resolution, offered by Mr. Soterios Nicholson of the District of Columbia, was to authorize and direct the President of the Association to appoint a committee of seven members to study the problem of pensioning members of this Association upon reaching the age of sixty-five or over; and further directed such committee to devise ways and means, showing by facts and figures how such a plan may operate, and submit its report to the Annual Meeting in 1938. The committee's comment set forth the purposes of the Association, as set forth in its Constitution, and pointed out that the proposal was not within any of these purposes. It added that the sums of money which might be involved in such an undertaking would perhaps be so large as to embarrass the Association in carrying out its express purposes. It therefore recommended that the resolution be not adopted. Recommendation carries.

At this point Mr. Harrington's resolution with respect to an investigation of the sources of income of law enforcement officials, which had been held in abeyance, was called up. Judge Hartshorne, of New Jersey, thereupon offered a resolution reciting that the American Bar Association "recognizes that in many quarters of this country an evil connection exists between politicians and organized crime, and the tremendous harm resulting therefrom to the lives and property of our citizens;" but "further recognizes the fact that the great body of our officeholders are hard-working officials, faithful to their trust;" and concluding with: "Now, therefore, be it resolved, That the Association commend this great body of our faithful officials, but urge its affiliated state and local bar associations and the citizens themselves, who suffer most, to unite and take vigorous action to suppress this nefarious connection between politics and crime, wherever there is good ground for believing that such condition exists."

Chairman Ransom said he was obliged to rule that this was not germane as a substitute for Mr. Harrington's resolution reported on by the committee. He referred the Hartshorne resolution to the Committee on Resolutions, for report. The question was now on the Committee's report on Mr. Harrington's resolution. On vote, the committee's recommendation against the resolution was adopted.

New Rule for Constitutional Decisions

The final resolution for consideration, offered by Mr. John D. Clark, of Wyoming, read as follows:

WHEREAS, many Americans consider it anomalous that judges who announce that they adhere to the rule that no law should be declared unconstitutional if there is reasonable doubt as to the scope of legislative power then join in a judgment against the constitutionality of a statute which several of their associates, equally learned, assert is quite within the power of the congress or legislature; and

WHEREAS, critics of our judicial process who would destroy the independence of the courts are always able, by exploiting this inconsistency, to create doubt among laymen as to the real purpose of the courts and the true character of our judicial system;

BE IT RESOLVED, that the American Bar Association recommends that the judges of the courts of the nation do themselves remove this source of persistent misunderstanding and danger by accepting as an objective standard of reasonable doubt in such cases the rule that if a substantial proportion of the members of the court are of the opinion that a statute is constitutional the others will defer

to that view and the judgment of the court shall sustain the statute.

Chairman Day stated that "by this resolution the American Bar Association would recommend to the judges of the Courts of last resort, State and National, that they adopt as an objective standard of reasonable doubt as to the unconstitutionality of a statute, the rule that if a substantial minority of the members of the court are of the opinion that a statute is constitutional, the majority should defer to that view and the judgment of the court should sustain the constitutionality of the statute.

"It means, in other words, that if a minority of the court entertains the view that the statute is constitutional, that fact should engender a reasonable doubt in the minds of the majority as to the unconstitutionality of the statute, regardless of the fact that a majority of the court have reached a deliberate and considered conviction that the statute is clearly unconstitutional.

"It would substitute for the long settled practice that the considered judgment of the majority shall determine the judgment of the court, the rule that the view of the minority shall determine the judgment of the court on constitutional questions. Not only is this contrary to the settled practice in courts of last resort, but it is contrary to the practice followed by other deliberative bodies, except where constitutional provisions expressly provide otherwise.

"It is our opinion that the reasonable doubt which should sway the balance in favor of the constitutionality of a statute is a doubt engendered in the minds of the members constituting a majority of the court, each of whom is answerable to his own conscience and his oath to support and defend the Constitution of the United States.

It is the conclusion of the Committee that the existing rule should be adhered to unless and until the people in the orderly process provided by the Constitution determine otherwise. We therefore respectfully recommend that the resolution be not adopted."

Mr. Charles M. Hay, of Missouri, wished to offer a substitute in the nature of a minority report. In his opinion, the resolution under consideration should be adopted in the following form:

BE IT RESOLVED, That we memorialize the Courts of the nation consisting of more than one member to adopt rules which shall provide that when a substantial number of the members of the court having under consideration the question of the constitutionality of an act of Congress shall be of the opinion that the act is constitutional, such opinions shall be held sufficient to raise a reasonable doubt of the unconstitutionality of the act, and to warrant the holding of the act constitutional on the ground that its constitutionality does not appear beyond a reasonable doubt.

"The modification I suggest," said Mr. Hay, "limits the application of the principle stated in the original resolution to the action of the courts in cases involving the constitutionality of acts of Congress. I favor the rule proposed in the resolution as modified upon the following grounds: 1. It would give practical and commonsense effect to the declaration of the court that it will not rule a law unconstitutional unless its unconstitutionality appears beyond a reasonable doubt. The court has made that declaration times without number. How can it be said that no reasonable doubt of the unconstitutionality of an act exists in the mind of the court when a substantial number of the learned justices are of the opinion that the act is constitutional? . . .

"2. The rule proposed in the resolution would square the practice of courts with other rules and requirements in the administration of justice. It seems incongruous that a system which requires the unanimous vote of twelve men as a prerequisite to a verdict even in a court in civil cases of minor importance, should permit another body of men by a bare majority to render a decision involving the fate of a great social or economic policy and the welfare of the whole people.

"3. The rule proposed would be in harmony with democratic principles. Under the present practice, five members of the Supreme Court can over-ride Congress, the President, and their four associates. In some instances the court by a bare majority has held acts unconstitutional, although enacted by a practically unanimous vote of Congress, signed by the President and declared constitutional by four of the members of the court. It is difficult to conceive of a more undemocratic and un-American practice. This is the essence of minority rule.

"By the adoption of a rule of this sort, the courts of America can go a long way toward bringing to pass that cooperation and respect in the relations of the courts, to other departments, which will redound to the benefit of the entire American government. . . ."

The hour for adjournment of the session having arrived, the Assembly then recessed; and the resolution, the reports thereon, and Mr. Hay's substitute resolution, went over to the next session.

Fifth Session of Assembly—Representative of Canadian Bar Association Delivers Address—President-Elect Vanderbilt Outlines Forward-Looking Program for 1937-38—Resolution for Public Hearing on Judicial Nominees Adopted

ASSEMBLY hears address from Mr. E. K. Williams, K. C., representative of the Canadian Bar Association, who proves himself a worthy successor to the other "Ambassadors of good will" whom that organization has sent us. President-Elect Vanderbilt emphasizes the fact that the public interest is foremost in the work of the Association and speaks of pressing and important problems that require practicable steps forward. Refers Clark resolution, with majority and minority reports to the Special Committee on Proposals Affecting the Supreme Court Assembly makes its contribution to affirmative actions of the meeting by adopting resolution drafted by Resolutions Committee, petitioning the Senate to adopt a rule requiring full public committee hearings on all nominations for judicial office. Adjournment brings realization that Assembly sessions have been exceptionally interesting.

THE fifth session was a luncheon session at which an address was made by Mr. E. K. Williams, K.C., who came as the honored and most welcome representative of the Bar of Canada.

Before introducing Mr. Williams, President Stinchfield recognized Col. Hugh C. Smith, formerly of the Judge Advocate General's office in Washington, who offered a resolution regretting the error in classifying the delegates from Hawaii, Puerto Rico and the Philippines in the published list of those registering for the meeting, and directing that the Secretary of the Association prepare a letter to be addressed to the chief executives of those countries and each of the delegates, tendering the apologies of the Association. Adopted.

President Stinchfield then introduced the three new members of the Board of Governors—Mr. Joseph W. Henderson of Pennsylvania, Mr. David A. Simmons of Texas, and Mr. W. G. McLaren of Washington; also Chairman George M. Morris, Secretary Harry S. Knight and Treasurer John H. Voorhees, who had been reelected. All were received with applause.

Introducing Mr. Williams, President Stinchfield said of our guest that "He has done so very many things that it takes so many of us to do; he has united them. He has served his clients well; he has served his country; he has served indefatigably the Bar Associations of Canada and of his Province; he is a member of the Bar of three Provinces. In addition to all of that, he is an author very widely accepted in Canada and, I presume, in England and if we knew about his books, I am sure we would have accepted them here.

"The relations between the American Bar Association and the Canadian Bar Association have been most friendly for many years. Mr. Williams is, I believe, of the firm of which Sir James Aiken was a member. He has been interested in bar associations a very long while. He is also a very intimate friend of a man whom we enjoyed exceedingly last year at our meeting, Mr. Brockington.

"Everything I have said is exactly true. I present to you Mr. Williams—in Canada they always add 'K. C.',—of Winnipeg, your friend, my friend, friend of the United States and a true representative of Canada." (Applause)

Mr. Williams said, in response to the cordial greeting: "During the last two days and a half it has been borne in upon me increasingly that the two most inadequate words in the English language are 'thank you,' and that is all that I can say, Mr. President, in acknowledging your all too generous introduction of me today, and, unfortunately, it is all that I can say on behalf of my wife and myself in thanking the President and the members of the American Bar Association, the members of the Bar of Kansas City, and the very charming ladies whom we have met, for the cordial, generous, and thoughtful attentions which have been shown to us. The language is too poor to attempt to do more than say how much we appreciate it and how sincerely we thank you.

"Perhaps I may be permitted to say this: that from now on when I look at the initials K. C., which, as part of my name and style I will do on many occasions, they

will signify to me not 'King's Counsel,' but 'Kansas City.'" (Applause)

"It occurred to me that I might borrow other language to express what we feel, two quotations if I may be permitted. The first is the last sentence of that memorable address made by Chief Justice Hughes, then Secretary of State of the United States, in that marvelous meeting in the great Hall of William Rufus in 1924, when the American Bar and the Canadian Bar met, together with our brothers of the bars of those islands, and he said this: 'This meeting of those who enjoy a common tradition and cherish a common purpose cannot fail to hit even our sense of responsibility as we find our strength renewed, our ardor quickened, and our hearts deeply stirred as we sit together at the fireside in the old homestead.'

"A member of the Toronto Bar, on his return from that trip, wrote a poem, one verse of which perhaps expresses, in addition, what I feel and am feebly trying to say:

> Brothers by blood and tradition primordial,
> Brothers again by the service we share,
> How shall we thank you for greeting so cordial,
> Tell you the answering kindness we bear.
>
> Rendering old custom ad imum a vertice,
> Richly fulfilling our every desire,
> Giving us each in the warmth of your courtesy
> A place at your table, a chair at your fire."

Mr. Williams then delivered his address, which was greatly enjoyed. It will be published in the December issue of the JOURNAL. At its conclusion President Stinchfield said:

"May I express for you to Mr. Williams our very great happiness that he has been with us, that he has brought Mrs. Williams with him, and may I thank him for his words of very great wisdom and of beauty? Perhaps I could say no more to him than this, that he brings us closer to Canada, he makes us understand Canadians better, he makes us like them better, and, if you will permit, I will say to Mr. Williams that we wish he would take back to Canada our very best wishes to the Canadian Bar Association and, may I say, our very best wishes for Canada. . .

"Just a word from me to you. It has been a very wonderful year. It has had its troubles, but a very great compensation. Every help that any man could ask for, you have given. Those immediately surrounding me have been of the utmost help. I should think perhaps even some of them would say they have done most of the work, and I have agreed.

"You will have someone this year who will himself do all the work that any man can do. Before I pass the responsibility to him, I should like again, as I did this morning to the Missouri State Bar Association, to express with all the emphasis possible our great happiness in having come to Kansas City.

"You have given us everything that a convention could ask; your hospitality has been unbounded, your kindness has been evident everywhere. I am quite certain that none of us coming away from Kansas City can ever expect that your kindness and hospitality of Kansas City, Missouri, will be exceeded, and I think it is doubtful whether it will be equalled. Will you join with me in saying to Kansas City and to Missouri, how very grateful we are for what they have done for us? (Applause)

"May I wish for my successor just the equal of the help and the kindness you have given me; but I shall say to you and to him that it will be some pleasure, on this target range which a President occupies, to be on the firing end instead of the receiving end. Gentlemen, I present to you your fine new President. He will do more work than you would conceive possible; he will have all the assistance that he can possibly ask for. He has labored for you now a great many years industriously. Mr. Arthur Vanderbilt of Newark, New Jersey." (Applause)

Mr. Vanderbilt then delivered a forward-looking address, which announced his point of view, and some items of his program, for the year's work. It is published elsewhere in this issue.

Mr. William L. Ransom then took the chair, at the request of President Stinchfield, for the disposal of unfinished business of the Assembly, in the form of reports by the Resolutions Committee, which had gone over from the previous session of the Assembly.

The unfinished business was the resolution of Mr. John D. Clark of Wyoming, that the Association recommend that the judges of the courts of the nation themselves remove a "source of persistent misunderstanding and danger by accepting as an objective standard of reasonable doubt in such cases the rule that if a substantial proportion of the members of the court are of the opinion that a statute is constitutional, the others will defer to that view and the judgment of the court shall sustain the statute."

Chairman Ransom explained the parliamentary situation, and recognized Mr. Clark to speak in support of his proposal. He said, in part:

"I have offered a resolution which ought to accomplish two purposes. No one else is suggesting anything else. I should like to identify some of the sources of conflagration because we have been told that our Rome is burning; I would attempt to find out where some of the fire comes from and, if possible, stop it, and, if not, at least rescue from it the institutions within our charge, those of justice; and of all things I can think of that are concrete and definite, certainly this proposition is the one which is causing more misunder-

standing among laymen who do not recognize the inexplicable rule applied by the courts in these matters.

"The institutions of justice will not be destroyed if you adopt it; it is already in force by constitutional provision in two of our great States, and I see no sign of ruin of the judiciary there.

"The second thing I would accomplish—and this may appeal to you if the other does not—is to endeavor to secure the continued support of those who in the last battle furnished you the leadership that gained you victory. . . I second the minority report and move that it be adopted."

Mr. Louis S. Cohane supported the majority report which, he said, represented the view of the entire committee, with the exception of one member.

Mr. Sylvester C. Smith, Chairman of the Special Committee on Proposals Affecting the Supreme Court, moved that the resolution and the reports on it be referred to that committee, for study and report. "I think there may be a great deal in what Mr. Hay and Mr. Clark have said as to the public attitude," Mr. Smith said. "I also think that there is a great deal of merit in the logic and the reasoning of those who have reported for the majority of the committee. But this question is connected with greater questions into which the committees of the Senate and the House will look seriously. I think it would be much better to have this resolution referred to the Special Committee, because when the time comes for that serious consideration of the subject, the Committee will be better able to ascertain the views of all the lawyers on this particular proposal—if it is pressed, as I think it may be."

After some further discussion, the motion to refer the resolution, which carried with it the majority and minority reports, to the Special Committee, was carried.

Chairman Day then presented the Resolutions Committee's report on Judge Hartshorne's resolution as to the evil connection between politics and crime, which had been held from a previous session of the Assembly. The Committee, he said, had neither the time nor the facilities for such an investigation as should precede any finding of fact upon such subject by the Association. The Section of Criminal Law has facilities for making a study of such matters, and the committee recommended that it be referred to that Section. The recommendation was adopted.

Chairman Day then stated that the Resolutions Committee offered as a substitute for Resolution No. 12 as amended, and for Resolution No. 17, offered as a substitute by Mr. Lessing Rosenthal, of Illinois, the following:

"RESOLVED, That the American Bar Association petition the Senate of the United States to establish a rule requiring every nomination for judicial office to be referred to an appropriate committee, and providing that such committee shall in every instance afford a full public hearing upon matters touching the fitness and qualifications of the nominee for the judicial office; be it further

"RESOLVED, That a copy of this resolution be transmitted by the Secretary of the American Bar Association to the Vice President of the United States with the request that it be laid before the Senate on the first day of the next Session of Congress."

Mr. Tullis of Louisiana, author of Resolution No. 12, accepted and supported the resolution recommended by the Committee.

The Assembly thereupon recessed to meet in the Exhibition Hall of the Auditorium immediately at the close of the final session of the House of Delegates.

STATEMENT OF THE OWNERSHIP, MANAGEMENT, CIRCULATION, ETC., REQUIRED BY THE ACTS OF CONGRESS OF AUGUST 24, 1912, AND MARCH, 3, 1933

Of American Bar Association Journal, published monthly at Chicago, Ill., for Oct. 1, 1937.

State of Illinois } ss.
County of Cook }

Before me, a Notary Public in and for the State and county aforesaid, personally appeared Joseph R. Taylor who, having been duly sworn according to law, deposes and says that he is the Business Manager of the American Bar Association Journal and that the following is, to the best of his knowledge and belief, a true statement of the ownership, management (and if a daily paper, the circulation), etc., of the aforesaid publication for the date shown in the above caption, required by the Act of August 24, 1912, as amended by the Act of March 3, 1933, embodied in section 537, Postal Laws and Regulations. printed on the reverse of this form, to wit:

1. That the names and addresses of the publisher, editor, managing editor, and business managers are:

Publisher, American Bar Association, 1140 N. Dearborn St., Chicago, Ill.

Editor-in-Chief, Edgar B. Tolman, 30 N. LaSalle St., Chicago, Ill.

Managing Editor, Joseph R. Taylor, 1140 N. Dearborn St., Chicago, Ill.

Business Manager, Joseph R. Taylor, 1140 N. Dearborn St., Chicago, Ill.

2. That the owner is: American Bar Association, Frederick H. Stinchfield, Pres., First Nat. Soo Line Bldg., Minneapolis, Minn.; Secretary, Harry S. Knight, Sunbury Trust & Safe Dep. Bldg., Sunbury, Penn.; John H. Voorhees, Treas., Bailey-Glidden Bldg., Sioux Falls, S. D.

3. That the known bondholders, mortgagees, and other security holders owning or holding 1 per cent or more of total amount of bonds, mortgages, or other securities are: There are none.

4. That the two paragraphs next above, giving the names of the owners, stockholders, and security holders, if any, contain not only the list of stockholders and security holders as they appear upon the books of the company but also, in cases where the stockholder or security holder appears upon the books of the company as trustee or in any other fiduciary relation, the name of the person or corporation for whom such trustee is acting, is given; also that the said two paragraphs contain statements embracing affiant's full knowledge and belief as to the circumstances and conditions under which stockholders and security holders who do not appear upon the books of the company as trustees, hold stock and securities in a capacity other than that of a bona fide owner; and this affiant has no reason to believe that any other person, association, or corporation has any interest direct or indirect in the said stock, bonds, or other securities than as so stated by him.

Joseph R. Taylor.

Sworn to and subscribed before me this 22nd day of Sept., 1937.

Day J. Thompson.

(My commission expires Sept. 15th, 1940.)

RESULTS OF THE REFERENDUM AS TO CHILD LABOR AMENDMENTS AND LEGISLATION

Members Overwhelmingly Approve Opposition to Amendment Submitted in 1924—Endorse Declaration Association Has Never Been Opposed to Amendment Properly Drawn and Limited to Commercial Exploitation of Children—Submission and Ratification of Vandenberg Amendment Favored by Substantial Margin—Enactment of Wheeler-Johnson Bill in Its Present Form Disapproved—Figures Announced by Board of Elections

THE results of the referendum directed by the House of Delegates as to Child Labor Amendments and legislation are in summary as follows:

The Association's opposition to the Amendment submitted to the States in 1924 was approved and continued, by a vote of about 4 to 1.

The Association's declaration that it has never been opposed to an Amendment properly drawn and limited to ending the commercial exploitation of the labor of children, was endorsed and ratified, by a substantial margin.

Preference for the submission and ratification of the Vandenberg Amendment, as compared with the 1924 Amendment, was expressed by a vote of over 6 to 1.

The submission and ratification of the Vandenberg Amendment were favored, by a substantial margin.

The enactment of the Wheeler-Johnson bill in its present form was disapproved, by a narrow margin.

The ballots were sent out to Association members on November 5th. The poll closed on December 1st, and the votes were immediately counted and tabulated, under the supervision of the Board of Elections, of which the Chairman is the Honorable Edward T. Fairchild, Justice of the Supreme Court of Wisconsin.

The total number of ballots cast and counted was 13,816. Not all of the members voting expressed their views upon each of the five questions submitted. There were 572 unidentified ballots (unaccompanied by signature slips). The vote upon the five questions was as follows:

Question One: Should the conditions produced by the labor of children be dealt with by an Amendment to the Constitution of the United States, granting to the Congress powers as defined in such Amendment?

Yes: 7,513; No: 6,126

Question Two: Do you favor the ratification of the Amendment, submitted to the States in 1924, providing that the Congress shall have power to limit, regulate and prohibit the labor of persons under eighteen years of age?

Yes: 2,743; No: 10,840

Question Three: As between (1) the Amendment submitted in 1924, providing that the Congress shall have power to limit, regulate, and prohibit the labor of persons under eighteen years of age, and (2) the proposed Vandenberg Amendment, providing that the Congress shall have power to limit and prohibit the employment for hire of persons under sixteen years of age, etc.—of which would you favor the ratification? 1924 Amendment: 1,797; Vandenberg Amendment: 11,254.

Question Four: If submitted by the Congress to the States, would you favor the ratification of the Vandenberg Amendment, providing that the Congress shall have power to limit and prohibit the employment for hire of persons under sixteen years of age, etc.?

Yes: 7,729; No: 5,777

Question Five: Should the Congress enact substantially the Wheeler-Johnson bill (S. 2226), entitled "An Act to regulate interstate commerce in the products of child labor, and for other purposes?"

Yes: 6,347; No: 6,907

Pursuant to Article V, Section 10, of the Constitution of the Association, the results of the referendum decide the Association's action and attitude upon the matters submitted, and constitute the instructions to the Association's Special Committee on Amendments and Legislation Relating to Child Labor. The results of the referendum are not, however, binding upon any State or local Association (Constitution, Article V, Section 2) or upon any individual member.

NUMBER OF BALLOTS VOTED BY STATES

The detailed vote by States upon each of the five questions is shown in the summary table prepared by the Board of Elections and published herewith. As attesting the representative and Nation-wide character of the referendum, the following table shows the number of ballots received and counted from each of the 48 States, the District of Columbia, and the Territorial Group and Hawaii combined:

VOTE ON THE REFERENDUM BY STATES

	Question 1 Amendment of Constitution as to Child Labor		Question 2 Ratification of Amendment Submitted in 1924		Question 3 Preference as to Ratification of		Question 4 Submission and Ratification of Vandenberg Amendment		Question 5 Enactment of Wheeler-Johnson Bill		Total Ballots Cast
					1924 Amendment	Vandenberg Amendment					
	Yes	No	Yes	No			Yes	No	Yes	No	
Alabama	31	84	14	101	7	101	35	80	28	85	116
Arizona	46	29	12	61	6	67	45	30	36	37	75
Arkansas	44	47	15	75	11	75	44	46	31	56	91
California	598	256	255	583	176	651	601	244	463	354	862
Colorado	89	90	26	148	12	154	101	77	66	108	181
Connecticut	110	116	22	204	15	198	116	108	98	123	228
Delaware	21	20	9	32	6	31	22	19	15	26	41
District of Columbia	315	196	117	394	68	429	314	184	269	225	517
Florida	111	113	47	178	34	172	106	110	108	109	227
Georgia	53	86	21	119	28	107	54	86	41	99	140
Idaho	15	16	9	22	5	24	12	18	16	13	31
Illinois	742	477	287	924	189	99[illegible]	757	449	567	622	1232
Indiana	168	102	66	206	45	206	173	94	134	128	272
Iowa	139	92	41	189	20	203	148	81	110	115	232
Kansas	108	112	28	190	19	190	119	97	100	114	220
Kentucky	78	113	24	168	18	166	94	98	80	110	195
Louisiana	75	84	30	129	23	125	72	85	65	88	159
Maine	37	42	12	68	8	68	39	40	29	48	82
Maryland	80	138	21	198	19	177	90	122	64	142	221
Massachusetts	364	277	93	554	54	562	377	256	279	346	655
Michigan	282	131	82	333	42	367	284	131	196	213	422
Minnesota	219	114	77	249	39	284	222	106	180	136	335
Mississippi	11	55	5	61	9	50	9	54	16	49	66
Missouri	310	277	94	488	68	491	301	280	272	299	593
Montana	26	22	7	40	4	42	25	21	21	25	48
Nebraska	94	126	29	190	16	198	107	111	98	118	223
Nevada	37	24	10	51	5	56	39	22	27	30	61
New Hampshire	29	24	10	43	7	46	31	19	27	25	54
New Jersey	273	143	115	302	80	329	279	137	244	163	422
New Mexico	32	17	13	36	10	40	26	20	28	19	50
New York	1000	886	416	1471	270	1529	1057	812	1036	794	1920
North Carolina	53	93	18	127	11	120	57	88	43	102	148
North Dakota	27	22	12	36	6	41	21	27	24	23	50
Ohio	395	234	141	478	83	523	412	212	284	335	638
Oklahoma	141	105	49	194	31	201	135	105	105	127	249
Oregon	90	33	31	90	21	100	91	31	61	56	126
Pennsylvania	381	314	148	537	109	547	393	290	310	363	700
Rhode Island	53	36	15	77	7	82	80	28	53	35	92
South Carolina	20	64	6	79	4	73	19	65	12	71	86
South Dakota	35	43	10	68	6	69	33	42	33	39	78
Tennessee	52	83	22	110	19	98	51	81	46	83	135
Texas	178	267	62	386	43	387	188	258	174	264	453
Utah	35	54	17	72	15	70	34	53	31	56	90
Vermont	17	39	2	54	3	44	19	37	24	32	56
Virginia	71	121	24	166	20	158	69	122	69	118	193
Washington	127	99	57	166	28	188	127	95	97	123	228
West Virginia	55	86	17	127	13	121	53	86	46	91	145
Wisconsin	204	98	89	213	56	237	201	100	159	136	306
Wyoming	12	14	2	24	0	24	16	9	10	16	26
Territorial Group & Hawaii	30	12	14	29	9	35	31	11	22	18	44
Total	7,513	6,126	2,743	10,840	1,797	11,254	7,729	5,777	6,347	6,907	13,816
Ballots not accompanied by signature slips	273	284	126	427	92	425	290	261	213	319	572
Total Ballots Cast											14,388

PREFERENCE FOR AMENDMENT METHOD

The results of the vote upon the five questions, taken together, may be taken as denoting and expressing the preference of lawyers for the *amendment method* of orderly constitutional change. Under such a method the States and the people have an opportunity to decide whether they wish the Constitution changed. The members of the Association voted emphatically their disapproval of the 1924 Amendment; but they preponderantly favored a constitutional amendment as to child labor, and also voted specifically for the submission and ratification of the Vandenberg Amendment.

At the same time, they voted disapproval of the Wheeler-Johnson bill, which had been drafted to utilize what have been said to be the existing powers of the Congress as to the movement of the products of child labor in interstate commerce. A definite factor in the vote against the Wheeler-Johnson bill was undoubtedly a feeling that a limited grant of necessary powers to the Congress should first be made by an Amendment to the Constitution, in the expeditious method assured by the Resolution to propose the Vandenberg Amendment, and that until such a grant of clear powers has been made, legislation should be deferred.

SCOPE AND SIGNIFICANCE OF THE REFERENDUM

The present phases of Child Labor Amendments and legislation were sent to referendum by vote of 112 to 15 in the House of Delegates in view of the importance of issues involving changes in the Constitution of the United States and because there had been criticism of the Association for opposing the 1924 Amendment without a vote of its membership. The subject was submitted to referendum at this time because of its newer aspects and because such a vote seemed to be the advisable way to determine the Association's stand upon such a controversial issue. Regardless of whether the Association should or should not have taken a stand upon the 1924 Amendment at the time it did and in the manner then provided for such determinations, such a stand had been taken, and had been reiterated by several annual meetings. With the contrary vote taken in the Assembly in Kansas City, a vote of the membership was the logical course for settling the controversy and clearing the way for other work of the Association to proceed.

Inasmuch as the subject was not at the time paramount in public interest, or in discussions within the profession, the total vote cast was naturally not as large as it was upon the Supreme Court issues earlier in the year. The vote was a representative expression of the views of the large number of members who availed themselves of the opportunity to vote upon the submitted issues, and the important thing was that the whole membership was given the opportunity to take part in the decision of the Association's stand.

The vote cast in this referendum will undoubtedly suggest to many persons active in the work of the Association that use of the referendum be confined, as the constitutional provision contemplated, to major questions which are of immediate and practical importance to the legal profession and the public, and so are under active consideration in public discussion at the time. The inference may also be drawn that the cohesion and cooperation which bring lawyers together in a voluntary Bar Association are not based upon a unity of views upon questions which have primarily social and economic aspects, even though they may involve changes in the fundamental law of the land.

The essential unity and hearty cooperation of lawyers in the work of the organized Bar are most clearly manifest upon issues which directly affect the administration of justice, the Courts, the problems of the profession, and the fundamentals of impartial justice according to law. The experience since 1933, as to the subject of child labor, may lead to habits of careful consideration of future proposals that the Association take a stand upon this or that issue before the public. In this instance, it now appears that the attitude taken at various annual meetings, in opposition to the 1924 Amendment, was in accord with the views of more than two-thirds of the members who held opinions which they wished to express on that matter; but it also appeared that opposition to the 1924 Amendment did not tell the whole story, and that a clear majority of such members are in no way opposed to an Amendment properly drawn and limited, and that they in fact favor the submission and ratification of such an Amendment. At the same time, a numerous and undoubtedly earnest and sincere minority favor the 1924 Amendment, even as another numerous, earnest and sincere minority oppose any Amendment on the subject and any substantial extension of Federal legislation and control into this field, for the reason that they are greatly disturbed by any further undermining of local self-government by the States and by the creation of additional bureaus in Washington for the centralized supervision of intra-state industry.

The fact is confirmed that lawyers think and act together upon most of the matters with which the organized Bar ordinarily concerns itself, and that they divide and disagree, as do other citizens, upon questions which appear to have primarily an economic and social import. The task of Association statesmanship may be to concentrate efforts in behalf of the measures on which the profession is substantially united, such as the further improvement of the administration of justice, the defense of the independence of the Courts, the better organization and discipline of the profession, the protection of individual rights against arbitrary and collective aggressions in the guise of "administrative law," the unceasing advocacy of the fundamentals of free government, and other matters on which the public is entitled to have the aid of the opinion of the lawyers.

THE ALIGNMENT OF STATES UPON PARTICULAR ISSUES

One of the significant and informative features of American Bar Association referenda is that the results are tabulated and announced by States. This has a particular bearing where the attitude of lawyers as to the future ratification of possible Amendments to the Constitution of the United States may be involved. In the referenda conducted last March and April upon the proposals to enlarge the Supreme Court and other Courts of the United States, the lawyers of every State voted in opposition; the variances were only in the ratio of opposition. In the present referendum, no such uniformity of opinion throughout the country was manifested, with the votes taken by State units.

On Question One, as to whether there should be *any* Amendment of the Constitution empowering the Congress to deal with child labor, a majority of the votes cast were in the affirmative in Arizona, California, Delaware, District of Columbia, Illinois, Indiana, Iowa, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Washington, Wisconsin, Territorial Group and Hawaii combined—a total of 26 States. A majority of the votes cast were in opposition in Alabama, Arkansas, Colorado, Connecticut, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Maine, Maryland, Mississippi, Nebraska, North Carolina, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, Wyoming—a total of 24 States. Particularly in the South, any Amendment which might further change the historic balance of powers between the State and National governments was opposed.

On Question Two, as to ratification of the 1924 Amendment, substantial uniformity of views was disclosed, in all parts of the United States: all States voted in the negative overwhelmingly.

On Question Three, as to preference between the 1924 Amendment and the Vandenberg Amendment, a like preponderance and uniformity of opinion among lawyers were disclosed. No State expressed preference for the 1924 Amendment; the preference for the Vandenberg Amendment was decisive and disregarded any sectional lines.

On Question Four, as to the submission and ratification of the Vandenberg Amendment, 29 States (Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Illinois, Indiana, Iowa, Kansas, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Washington, Wisconsin, Wyoming, Territorial Group and Hawaii combined) voted in favor, and 21 States (Alabama, Arkansas, Florida, Georgia, Idaho, Kentucky, Louisiana, Maine, Maryland, Mississippi, Nebraska, North Carolina, North Dakota, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia and West Virginia) voted in opposition.

On Question Five, as to enactment of the Wheeler-Johnson bill in substantially its present form, 14 States (California, District of Columbia, Idaho, Indiana, Minnesota, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Oregon, Rhode Island, Wisconsin, Territorial Group and Hawaii combined) voted in favor of such enactment, and 36 States (Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia and Wyoming) voted in opposition.

VOTE AS TO THE WHEELER-JOHNSON BILL

Without extending the referendum to include too many questions, it was not practicable to take a vote upon all of the recent proposals for Federal legislation without constitutional amendment. The Wheeler-Johnson bill (S. 2226) was included, for the reason that it had twice passed the Senate and seemed to be at the stage of early consideration by the Congress.

This omitted from the ballot the Black-Connery bill and that of Senator Barkley of Kentucky, each based on the principle of the first Federal Child Labor Law, which was invalidated by the Supreme Court. The Black-Connery bill had been reported by the House Committee on Labor.

The text of the Wheeler-Johnson bill was included with the referendum ballot as sent out to members, and the provisions were evidently analyzed and studied by many of them. Some of them found matters in the bill they did not like, such as the provisions dealing with the liability of distributors. Whether or not these and other provisions go to the merits of the bill as a whole, they undoubtedly led some members to vote disapproval of the bill.

The preference of some members for other forms of legislation, the objections of some members to particular provisions of the Wheeler-Johnson bill, and the belief of many members that further Federal legislation in this field should await the granting of definitive powers to the Congress, and perhaps other factors, combined to bring about the negative vote on the Wheeler-Johnson bill.

ASSOCIATION REFERENDA ARE REPRESENTATIVE AND SIGNIFICANT

The referendum questions received the scrutiny of many thousands of lawyers. Necessarily, the referendum invited a vote on the specific proposals which are under active consideration by the Congress, and could not feasibly have been lengthened to include other

possible, perhaps desirable, alternatives. It had to give an opportunity to vote "yes" or "no" on the issues which represent the usual alignments and divisions of opinion; it could not be adapted so as to register also such angles of viewpoint as are not according to the familiar patterns.

The future stand of the Association has been determined by its membership. The decisive vote against the 1924 Amendment and for the Vandenberg Amendment leaves no doubt that Association members held and voted their own views on the subject.

Perhaps the outstanding significance of the referendum is the confirmation of the fact that the American Bar Association as now organized provides the vehicle for obtaining and making available to the public the informed opinion of the lawyers throughout the country—not merely of the lawyers in one city or locality, not merely of leaders of the Bar as such, but of the profession as a group, the rank and file of lawyers in every State. Inasmuch as fully half of the Association membership is in the towns and small cities, the representative character of the results of such a referendum is attested as a cross-section of Nation-wide opinion.

The American Bar Association has more than 31,000 members. Its membership list is known and published, by States and localities. The referendum results are tabulated and announced by States. No other organization of lawyers does, or could, conduct such a plebiscite to so large and representative a membership, made up of lawyers of all sorts of views, affiliations, experience, and economic status. Association attitude that is determined by such a referendum, or is determined by the representative House of Delegates with a referendum available if there is doubt of the correctness of its decision, has a significance and authority which do not attach to the pronouncements of relatively small and undisclosed special-interest groups.

COMPARATIVE ATTENDANCE FIGURES

THE thoroughly representative character of the attendance at annual meetings of the American Bar Association, and the shifts in the attendance from particular States according to the locality in which the meeting is held, are shown by the following table, which compares the attendance registered at the Los Angeles, Boston, and Kansas City meetings. It is interesting to note that, with the time of the 1937 meeting exceedingly inconvenient for lawyers at a distance, some 2,064 of the 4,181 lawyers registered came from the State of Misouri, with 481 from Kansas City and 188 from Oklahoma.

	Los Angeles (1935)	Boston (1936)	Kansas City (1937)
Alabama	5	21	13
Alaska	..	..	..
Arizona	46	6	6
Arkansas	13	19	56
California	909	49	49
Canal Zone	..	1	..
Colorado	27	23	35
Connecticut	9	77	23
Delaware	2	7	5
Dist. of Columbia	71	197	80
Florida	22	55	28
Georgia	9	36	17
Hawaii	2	2	1
Idaho	7	3	4
Illinois	78	148	193
Indiana	14	34	31
Iowa	24	30	94
Kansas	21	26	481
Kentucky	8	28	10
Louisiana	9	39	25
Maine	3	40	3
Maryland	19	68	22
Massachusetts	22	837	30
Michigan	23	67	45
Minnesota	23	50	57
Mississippi	4	8	14
Missouri	72	103	2,064
Montana	5	2	4
Nebraska	22	26	115
Nevada	26	6	7
New Hampshire	1	55	4
New Jersey	16	98	28
New Mexico	9	3	9
New York	83	381	88
North Carolina	12	40	13
North Dakota	6	8	8
Ohio	51	127	58
Oklahoma	32	42	188
Oregon	32	8	9
Pennsylvania	31	124	31
Philippine Islands	1	..	1
Porto Rico	..	..	1
Rhode Island	6	78	5
South Carolina	3	21	5
South Dakota	11	8	15
Tennessee	12	27	18
Texas	77	79	105
Utah	43	6	8
Vermont	2	40	2
Virginia	9	27	9
Washington	14	12	13
West Virginia	7	19	4
Wisconsin	26	43	36
Wyoming	8	3	9
Foreign	11	11	2
Total	1,998	3,268	4,181

These figures are deemed to confirm the policy of holding the annual meetings in various parts of the United States, in order that all members of the Association may have the opportunity to attend; also the need for a representative House of Delegates whose personnel is not affected by the locality of the particular meeting.

NOTICE BY BOARD OF ELECTIONS

The Board of Elections has prepared a form of nominating petition for State Delegates to be elected in 1938, and also a special form of nominating petition for State Delegates to fill vacancies existing on or before February 15, 1938. Copies of these forms will be sent upon request addressed to the headquarters office in Chicago.

Edward T. Fairchild,
Chairman, Board of Elections

COMMITTEE ON AMERICAN CITIZENSHIP PLANS NATION-WIDE SPEAKING CAMPAIGN

Junior Bar Conference Enlisted in Campaign by Appointment of Junior Bar Members to Committee from Each of the Ten Circuits and by Endorsement of Plan for Cooperation at Recent Meeting of Council of Conference in Chicago—Speakers on Various Phases of Duties and Privileges of Citizenship to Be Supplied to Every Organization that Desires One—Campaign to Be Conducted on Strictly Non-Partisan Basis—Sesqui-Centennial Year Affords Unusually Good Opportunity for Such Undertaking.

By Hon. Arthur T. Vanderbilt
President of American Bar Association

EXPERIENCE over three years has demonstrated that when a task requires action as well as discrimination no mistake has been made in entrusting it to the Junior Bar Conference. "Old men for counsel; young men for action."

Accordingly, when a nation-wide speaking campaign on the problems of American citizenship was determined upon as one of the chief points in the American Bar Association program of endeavoring to serve the public, the natural thing to do was to enlist the support of our Junior Bar. This has been accomplished by the appointment of Junior Bar members from each of the ten circuits to the Committee on American Citizenship on the recommendation of the officers of their Conference. With this went the tacit understanding that the Committee would cooperate with the Junior Bar Conference and would, in turn, receive the support of the Conference by the recognition of American Citizenship work as one of its major activities for the year.

This tacit understanding was ratified at an enthusiastic meeting held at Chicago on November 19th and 20th of the members of the Committee on American Citizenship and the Council of the Junior Bar Conference. The enthusiasm manifested for the program there developed is welcomed as an earnest of what this group can and will accomplish during the year.

Under our By-Laws the Committee has a very weighty responsibility:

"It shall be its duty to inspire in the people of the United States a proper appreciation of the privileges as well as the duties of American Citizens."

The members of the Committee propose to build upon the broad foundations laid by their predecessors. To the distinguished lawyers who in past years have labored in this field we are indebted not only for the preparation of invaluable handbooks and reports, but also for a precise definition of the immediate task of the Committee:

"The true lawyer must remember that he must be a good citizen as well as a loyal member of the Bar. The law is not a trade, but a high and noble profession, and the greatest duty of a lawyer, whose influence in every community could rise above that of any other class, is to educate his fellow citizens in forming sound views of government. To do this he must himself constantly return to the sources of our free institutions and revive his own faith in their essential verity. . . .

"However, the education of the Bar in the Constitution of the United States would be of little avail if the American people, too many of whom live in the passing day, forgetful of the past and indifferent to the future, have no adequate idea of the form of government under which they live. And if that form of government is to survive, then it is necessary that in some way the American people be educated to understand it and inspired to defend it. The assumption that the American people understand their form of government would be a very rash one. To them the Constitution of the United States is either an historical tradition or a mere legalistic abstraction."

Ignorance not only of the structure and process of government but of the personalities who actually do the governing is not confined to any one class in our population. It involves all classes and all professions (unless we classify politics as a profession) including, I regret to say, the law. If you doubt this broad statement, try the experiment of asking almost any audience to name their local, state or national officers; you will then be able to demonstrate for yourself the depths of our political ignorance.

I shall never forget an incident that happened to me over a decade ago when a distinguished New York lawyer telephoned me, a newcomer in the town, and asked me to come down to the town hall that evening to vote for school trustees. When I asked him who the candidates were, this eminent member of the New York bar solemnly assured me that everyone was voting for numbers 1, 3 and 5 on the ticket. I have not yet recovered from the shock; even race horses are chosen by name. If your audience should perchance survive the test of naming their public officers, I suggest a few elementary questions on the organization and functioning of local, state or national government. This is a device which every young speaker should know. If properly used, it will induce a most respectful attitude on the part of the audience, but great care must be taken not to push it to the extent of goading the audience into active hostility.

This widespread ignorance is the result, of course, of gross indifference to the problems of government. We are too involved or too busy or too self-centered to realize the importance to each and every one of us of our government, for whether we like it or not, in a democracy it is *our* government. What is everybody's business is nobody's business—except the politicians. How is this indifference to be overcome? Simply by demonstrating to our fellow-citizens what government

means to each of them, say the young men who comprise our Committee on American Citizenship.

This, they propose to do, with the cooperation of the Junior Bar Conference, by supplying speakers on various phases of the duties and privileges of citizenship to every gathering that desires a speaker, such as civic clubs, service organizations, parent-teacher associations, labor unions, patriotic societies, naturalization groups, night schools, meetings of professional men and the like. This work will obviously require in each state, and in many counties, a committee or a leader to arrange for speakers on request, to obtain speakers (who need not be Junior Bar members or even members of our Association), to see that they are supplied with the proper material and to make sure that their speeches are given due publicity in the press. This leadership will be supplied through the associate and advisory members of the Committee on American Citizenship and the state leaders of the Junior Bar Conference. The members of the Committee itself, will of course, take charge of the preparation of outlines of speeches and bibliographies and supervise the work in their respective circuits.

The work of the Committee will be conducted on a non-partisan basis. There is much that can be said on American Citizenship without rising to the heights or sinking to the depths (depending on whether or not you agree with the speaker) of partisanship. After all, this is a government of all the people. Nearly all of us are firm believers in the democratic and representative process of government. When we survey the changes that are in progress on the four other continents and that seem to be gradually approaching our shores, we should be interested primarily in preserving our process of government, which has been the envy of the oppressed throughout the world, rather than in promoting the tenets of some political sect that we fondly hope might be the means of further improving what we now have.

Our government is peculiarly dedicated to the principle of liberty under law; and who should know better than lawyers the benefits to all concerned of that great principle of government? It is obviously proper in times of transition such as ours that lawyers should take the lead, as they have in other such periods, in clearing away the fogs of misapprehension and error and in focusing attention on the benefits as well as the dangers of democratic representative government. Above all, must we be reminded that government—and least of all a government by the people—is not an automatic process that can be trusted to run without attention. We must never be allowed to become so preoccupied with either success or adversity as to forget that eternal vigilance is still the price of liberty.

This year with its continued celebration of the sesqui-centennial of the Federal Constitution affords an unusual opportunity for this work. We can never emphasize too much the importance of the fact that we have *a* constitution. The fact that we have *a* constitution to which every citizen can turn for protection far transcends in significance the fact that we have *the* Constitution. Countries which do not have a constitution are countries where the armed and ruthless hand of despotism has overthrown justice, where liberty, without which the spirit of man must die, has been banished, and where law is the force-imposed will of one man or one small group of men. We do not need to turn back the pages of history to demonstrate what a constitution means to every citizen; all we have to do is to look to the East, the South or the West.

With respect to our own Constitution in these days of stress and uncertainty we need to get away from phrases and back to fundamentals; we need to realize that *our* Constitution not only sets up a form of government, but fixes limitations on its power in favor of its citizens and (the importance of this should never be lost to sight) prescribes the modes of amending it.

The Junior Bar Conference, in furtherance of these plans of the Committee on American Citizenship, is preparing bibliographies and outlines on such topics as Jury Service, Voting, The Origin of Jury Trial, Civil Liberties, The Operation of Our Government, The Relation of the Citizen to his Government.

The Committee plans to dramatize its work by several programs over a national network of radio stations, culminating, it is hoped, with a nation-wide celebration on June 21st, the anniversary of the day when New Hampshire adopted the Constitution, thereby making possible the establishment of the Federal government. Local and circuit broadcasts are contemplated in the discretion of the localities concerned.

Somewhere and sometime in the course of this work I hope there will come a revival of those small groups or clubs for the free and informal discussion of the problems of government, clubs like the Junta of Benjamin Franklin, the Moot of William Livingston and John Jay, and the Sodality of James Otis and John Adams. In groups such as these were threshed out the principles and process that made possible the War for Independence, the Articles of Confederation and finally the Federal Constitution. The cracker box discussions of the Four Corners' Grocery Store carried on the same tradition in a somewhat different environment. All these groups had characteristics in common: an intense and enlightened interest in public affairs, a passion for getting down to fundamentals, a realistic approach to the problems and personalities of government, and a sane common sense in knowing how best to meet the instant problem for the common good.

It may be questioned in some quarters as to whether such groups are possible in the age of the automobile, the radio, the movie and the comic strip, but any such doubt grossly underestimates the intensity of the desire of the young men of today for sanity and progress in public affairs. Where better can false propoganda be exposed and exploded than in such informal meetings, or where better can sound ideas for our future government be better threshed out? Where better can sound leadership be self-trained than in such clubs that may well be the result of the campaign of public education in the program of American Citizenship contemplated by our Committee?

The program of the Committee manifestly is an ambitious one, but the opportunity is correspondingly great. The Committee requests and is entitled to the cooperation of every member of our Association, in suggesting speaking engagements, in volunteering to deliver addresses, in rendering available radio facilities, in giving publicity to speeches after they are delivered, in suggesting topics for discussion, and generally, through a keen appreciation of the opportunities that this movement affords the bar to serve the public.

The members of the Committee on American Citizenship and the members of the Associate Advisory Committee are listed at pages 893-894 of the November Journal; the names of the State Chairmen of the Junior Bar Conference are set forth at the end of this article. If you are moved to assist in this worthy program won't you get in touch with the representative in your state? It is difficult to think of many ways in which our members can be of greater help to the bar and the public than by participating in this work.

STATE CHAIRMEN OF JUNIOR BAR CONFERENCE

Alabama—JOHN L. GOODWIN, 22 S. Perry St., Montgomery.
Arizona—IVAN ROBINETTE, Professional Bldg., Phoenix.
Arkansas—H. HOWARD COCKRILL, Pyramid Bldg., Little Rock.
California—HAROLD W. SCHWEITZER, 448 S. Hill St., Los Angeles.
Colorado—MARK H. HARRINGTON, First Nat'l Bank Bldg., Denver.
Connecticut— J. RONALD REGNIER, 690 Asylum St., Hartford.
Delaware—C. EDWARD DUFFY, Industrial Trust Bldg., Wilmington.
Dist. of Columbia—LEO N. MCGUIRE, Union Trust Bldg. Washington.
Florida—W. G. TROXLER, Box 1390, Miami.
Georgia—EDWIN L. STERNE, Candler Bldg. Atlanta.
Hawaii—DUDLEY C. LEWIS, Hawaian Electric Bldg., Honolulu.
Idaho—KENNETH W. O'LEARY, Box 222, Boise.
Illinois—WILLIAM A. MCSWAIN, 38 S. Dearborn St., Chicago.
Indiana—HAROLD H. BREDELL, 115 N. Pennsylvania St., Indianapolis.
Iowa—JAMES L. DEVITT, Oskaloosa.
Kansas—PHILIP H. LEWIS, New England Bldg., Topeka.
Kentucky—J. PAUL KEITH, JR., Ky. Home Life Bldg., Louisville.
Louisiana—OLIVER P. SOCKWELL, Lake Charles.
Maine—JAMES L. REID, 69 Willow St., Augusta.
Maryland—NORWOOD B. ORRICK, Mercantile Trust Bldg., Baltimore.
Massachusetts—FRANCIS H. RUSSELL, 18 Tremont St., Boston.
Michigan—ROY W. DAHLBERG, Penobscot Bldg., Detroit.
Minnesota—JOHN DELAITTRE, Security Bldg., Minneapolis.
Mississippi—CHARLES A. SISSON, Planters Bank Bldg., Clarksdale.
Missouri—LON HOCKER, JR., 705 Olive St., St. Louis.
Montana—EDMUND T. FRITZ, 802 Broadway, Helena.
Nebraska—JAMES J. FITZGERALD, JR., Insurance Bldg., Omaha.
Nevada—FRANK B. GREGORY, Box 1445, Reno.
New Hampshire—RALPH E. LANGDELL, 839 Elm St., Manchester.
New Jersey—GUY TOBLER, 210 Main St., Hackensack.
New Mexico—ROBERT W. BOTTS, First Nat'l Bank Bldg., Albuquerque.
New York—ALFRED T. WHITE, Municipal Bldg. Corporation Counsel's Office, New York.
North Carolina—HENRY BANE, 111 Corcoran St., Durham.
North Dakota—WILLIAM R. PEARCE, Box 832, Valley City.
Ohio—JAMES ARTHUR GLEASON, Williamson Bldg., Cleveland.
Oklahoma—JAMES D. FELLERS, First National Bldg., Oklahoma City.
Oregon—WILLIAM W. BARTLE, U. S. Natl. Bank Bldg., Eugene.
Pennsylvania—JOSEPH D. CALHOUN, 218 W. Front St., Media.
Rhode Island—WOODWORTH L. CARPENTER, Industrial Trust Bldg., Providence.
South Carolina—FRANK H. BAILEY, 63 Broad St., Charleston.
South Dakota—BOYD M. BENSON, 1030 Illinois Ave., S. W. Huron.
Tennessee—HOWARD W. PRITCHARD, Commerce Title Bldg., Memphis.
Texas—ALLEN MELTON, Mercantile Bldg., Dallas.
Utah—F. HENRI HENRIOD, First Nat'l Bank Bldg., Salt Lake City.
Vermont—WILLSIE ERNEST BRISBIN, 178 Main St., Burlington.
Virginia—FIELDING L. WILLIAMS, Amer. Nat'l Bank Bldg., Richmond.
Washington—EDWARD B. HANLEY, JR., American Bank Bldg., Seattle.
West Virginia—CLARENCE E. MARTIN, JR., Peoples Trust Bldg., Martinsburg.
Wisconsin—STEWART G. HONECK, 710 N. Plankinton Ave., Milwaukee.
Wyoming—EDWARD E. MURANE, Townsend Bldg., Casper.

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THE BAR AND LEGAL EDUCATION

The Profession of the Law Is Here to Do Justice and to Do Justice a Man Must Have Good Moral and Intellectual Habits—We Must Ask Ourselves What the Learning Is That Will Bring Our Learned Profession Closer to This Ideal—Characteristics of the Educated Man—General Principles Which the Bar Must Regard as Fundamental and Which Candidates for It Must Understand—Educational Requirements of the Bar Today Are Directed to Seeing That the Future Lawyer Gets More Education, but the Important Thing Is the Kind of Education He Gets—A Responsibility of the Bar That Cannot Be Evaded, etc.*

By Robert Maynard Hutchins
President of the University of Chicago

THE bar associations have done a great deal for legal education. Through their examinations they have prevented the most illiterate section of the population from joining our profession. Through their standards they have seen to it that those who could not afford to spend two years in college and three years in law school could not join our profession. Through their tests for character they have in some states excluded those caught in the public commission of the more serious crimes from our profession. All these things have had a more or less helpful effect on our profession and on legal education. Some bad law schools have gone out of existence. Some bad men have betaken themselves to other walks of life. They have probably become ministers or doctors; for these professions are not organized as we are to protect themselves against the unfair competition of the wicked. The educational standards of the bar may have contributed to produce the happy situation described by our president in the current issue of the Journal, where he intimates that we are a lot better, a lot wiser, and a lot more public-spirited than any other profession whatever.

Perhaps we are. Rousseau remarked that in the country of the blind the one-eyed are kings. Yet I must confess that if we are I do not quite see why we are. The qualifications for the bar, though well-intentioned, do not seem to me such as to guarantee this result. Indeed, as I shall show later, they may in some cases lead to the opposite conclusion: they may interfere with the development of the kind of lawyers we like to say we want. I suggest that the time has come to reconsider the relation of the bar to education preparatory to it. I propose to do this by examining the nature of law as a profession and by deriving therefrom the consequences for legal education and the obligations of the bar toward it.

Any profession, if it is to be distinguished from a trade, must have an intellectual subject matter in its own right and must be dedicated to the common good. As a contemporary writer has said, "A profession is not simply a collection of individuals who get a living for themselves by the same kind of work . . . It is a body of men who carry on their work in accordance with rules designed . . . to impose on the profession itself the obligation of maintaining the quality of the service, and to prevent its common purposes from being frustrated through the undue influence of the motive of pecuniary gain upon the necessities or cupidity of the individual." A profession must at least be "free from the vulgar subordination of moral standards to financial interests." But that is not enough. It must also be directed to serving the interests of the community. When a prominent businessman says, in announcing an important deal, "Our only motive is to make a profit," we may be permitted to doubt whether business is yet a profession; and in view of the activities of some of our brethren we may wonder whether the law has remained one.

Yet the law is that profession of all professions which should meet true professional requirements. Ours is the profession through which justice is done. Justice consists of all the moral virtues in their social aspect. The moral virtues are habits of acting rightly, and justice is the habit of acting rightly in society. The moral virtues depend upon prudence, which is practical wisdom. This is especially true of justice, as the word jurisprudence suggests. And prudence in turn is aided by other intellectual virtues, such as science and theoretical wisdom. In short, it is impossible to be good without being wise, both practically and theoretically. The man who would act will need practical wisdom to select the means toward his good ends. But it is also impossible to be wise without being good. You cannot be truly wise unless you have good ends in view. The intellectual virtues are not enough; they must be supported by the moral virtues. Science can be used for evil as well as good. There is an appearance of prudence in the scheming of a thief. But true prudence directs a man neither to worldly success nor dishonest gain. An educational system which sent an annual crop of able go-getters or thieves out into the community could hope for the applause of nobody but its alumni.

Our profession, then, is here to do justice. To do justice, men must be just. That is, they must be both good and wise in respect to their own ends and in their relations with other men. And since justice can exist only in a political society, they must understand what such a society is. The state is an organization designed to promote the common good. The common good is that condition of peace, order and eco-

*Address delivered before the Assembly of the Association on the evening of Wednesday, Sept. 29.

nomic sufficiency which provides happiness for all, to the degree to which they can participate in it. Happiness is activity in accordance with the moral and intellectual virtues, that is, good moral and intellectual habits. The principal object of the state is therefore to promote good moral and intellectual habits in the population. Its principal object is not to foster the acquisition of wealth, or to protect property, or to inflate the national ego. Least of all is the state an end in itself. The state exists for man, not man for the state. The totalitarian state is a perversion and a monstrosity. To do justice, then, a man must have good moral and intellectual habits; and since he will want to live in a state and not in a caricature of one, he will act so as to develop those habits, as far as he can, in his fellow-countrymen.

We must then ask ourselves what the learning is that will bring our learned profession closer to this ideal. It is surely not mere knowledge of the rules of law. Even a parrot could learn those; but we should probably not wish to admit him to the bar. Nor is it knowing how to manipulate rules of law. All that is required for that is experience or a good guide-book. Cooking is an example of an occupation that requires you to follow certain rules, but not to understand them. If your devotion to the cook-book is sufficiently religious, you are very likely to succeed. It is not yours to reason why; you follow the instructions. We have always claimed for our profession a higher intellectual status than that to which we have permitted cooks to aspire.

An educated man knows what he is doing and why. An educated lawyer must know the purpose of the law; he must know how the law came to be what it is; he must know the nature and purpose of the society in which the law operates; he must know the application of what he knows to the particular case with which he is dealing. Law is an expression of practical reason. Hence it has intellectual content which lawyers must master. And by this route we come back to the common good; for, as a mediaeval saint who was a pretty good lawyer put it, "Just as nothing stands firm with regard to the speculative reason except that which is traced back to first indemonstrable principles, so nothing stands firm with regard to the practical reason, unless it be directed to the common good: and whatever stands to reason in this sense has the nature of a law."

The lawyer, then, must be a learned man in the sense that he has mastered the intellectual content of the law, and he must be a professional man in the sense that he is laboring for the common good and not for honors or riches. The present requirements for admission to the bar seem hardly adequate to achieve this ideal. Yet they seem to be directed toward it. In setting up character qualifications, the bar seems to be requiring that lawyers be men of moral virtue. In setting up scholastic hurdles, it seems to be requiring that lawyers be men of intellectual virtue. But let us see whether these hopes are justified. Let us see whether the requirements as they are and as they are administered do actually force the educational system to concern itself with the preparation of men who have either good moral habits or the kind of learning that leads to wisdom.

The rules usually call for two years of college and three years of law school. When, as in my own state, they become more specific, they indicate the law courses a student must have passed and the time he must have spent in the classroom. The 1,200 hours which the Illinois student must serve in hearing what the courts have done about everything from Agency to Wills may familiarize him with the rules of the jurisdiction, but they do not necessarily make him an educated lawyer, understanding the law and the role of his profession in society. Like the provision in Vermont which forbids the student to study anything but legal rules for three years, Illinois may actually prevent a university from trying in the law school to give an education as against cook-book drill.

I must admit that few universities and few law schools seem much interested in anything but cook-book drill. The popularity of job analysis, which may be helpful in training mechanics for particular jobs, has made a great impression on education. There is even a college for women which has constructed its course of study by asking what jobs women perform, analyzing them, and then training its students to go through the motions involved in them. If we want technicians, competent craftsmen, men crammed with citations and skilled in practical maneuvers, we can get them by this routine.

You may ask why not? You may suggest that the purpose of a law school is to put a student through this routine and that he is supposed to have got his education before he gets there. To this there are two answers. In the first place, though I have no objection to the establishment of institutions that will teach a student legal rules and legal tricks, I have every objection to the conduct of such instruction in a university. Universities exist to find and impart the truth. What has such instruction to do with such aims? Or if you deny that these are the aims of universities, you must admit that they are established for the public welfare; and you must admit, too, that there is no connection between the well-being of the community and the manufacture of cook-book lawyers.

In the second place the colleges are infected with the same diseases from which the law schools are suffering. We are approaching the time when all subjects will be taught as merely descriptive of things past or present; when these descriptions will be valued only if they seem to have some bearing on vocational success, and when information of a current, vocational kind will take the place of thought in education. Neither years in college nor years in law school need necessarily help us raise the standard of the bar.

What will help us? Suppose we insisted on specific subjects that are usually considered as non-legal and added some that are legal but that are not now emphasized in law schools. Suppose we required a student at some time in his career to study, in addition to the conventional law-school subjects, psychology, philosophy, including ethics and politics, history, economics, legal history, and legal philosophy. It is perfectly possible to cover these materials in such a way as to defeat the production of the kind of lawyers that we presumably want and to produce instead shrewd, sly, corrupt, amoral, and dangerous brethren for us. The student can learn that philosophy is getting adjusted to your environment, that economics is how to get rich, and that political science is who gets what and how. We could not expect from such an education that the neophyte would be prepared to join us in our noble efforts to improve the moral and intellectual level of the bar. He will be of no greater assistance to us than the lawyer who thinks that the law is merely what (and whatever) the courts will do.

The question before the bar is whether it really

believes that the principal issue it must face is a moral and intellectual one. If it does, then it must agree that its present efforts are little short of farcical. Those efforts must be directed to producing people who know that there are such things as morals and who have had some genuine intellectual experience. This means that though the bar would not wish to prevent a professor from investigating who gets what and how in politics and would even wish to encourage him to assemble this information, it would insist that a course in political science give the prospective lawyer an adequate notion of the purpose of the state. It means that a course of study in how to read cases, memorize rules, and manipulate them would be foreign to the moral and intellectual purpose of the bar. It means, I am afraid, that the bar must have some views about the nature and object of law, of political society, of justice and of morals, and must devise means of discovering whether the young man clamoring at the gates has had such an education as to make it likely that he shares them.

You will probably tell me that everybody is entitled to his own opinion on these great themes This reduces liberalism to the absurd conclusion that we must reconcile ourselves to any kind of viciousness, stupidity, and indolence. It is true that in practical matters, as to contingent singular things, there is no mathematical formula that can be applied to the facts and tell us quickly and infallibly what to do. But the general principles of the practical reason are as self-evident and as indispensable as the first principles of the natural sciences. "As regards the general principles whether of speculative or of practical reason, truth or rectitude is the same for all, and is equally known by all." Substantial agreement upon the most important of these general principles is essential if the bar wishes to have any intelligible standards for admission to it.

What are these general principles which the bar must regard as fundamental and which candidates for it must understand? I beseech you not to suppose that in what I am about to say I am outlining a course of study. I beg you, too, to realize that the propositions I shall state will be given so briefly that all the qualifications and all the subordinate distinctions that should accompany them will be omitted. Nevertheless I think you will understand me if you take these propositions as tests, as touchtsones, as ways of measuring the results of legal education. They are ways of testing the qualifications of a candidate. They are ways of suggesting how education, general and legal, should be reformed. Rightly understood, these propositions will serve to detect in those who affirm or deny them the presence or absence of those few basic convictions which the members of our profession should share. If the candidate does not possess this irreducible minimum of moral sense and intellectual clarity, we should have some doubt about his qualifications for the bar and about those of his college and his law school to prepare men for it.

ROBERT MAYNARD HUTCHINS
President, University of Chicago

I propose, then, certain tests by which one may gain some insight into whether a student has the moral character and the intellectual ability to become a member of the bar. I repeat that these tests are neither automatic nor conclusive. I insist merely that they are more suggestive and revealing than any required by the present rules in any state. And the first of them is that from his studies, and I should hope from his study of psychology, the student should have come

to suspect that man is distinguished from the other animals by his reason. This is indicated by the fact, among others, that no animals except men are lawyers. To say that man is a rational animal is not to deny his animality, his susceptibility to emotional and irrational influences. It is only to deny that he is a mere brute. The student must have heard that, in the order of human powers, reason rules. Otherwise he will not understand that law is an ordination of reason, commanding or prohibiting human acts. Further he must realize that reason is not a shifting or variable factor, but is always and everywhere the same. The human nature which constitutes man as a species must be a constant if the notion of species has any content. This does not mean that the conventions and institutions of mankind are everywhere the same. It means only that all these changing conventions have an unchanging natural basis. By inquiring into his understanding of these propositions we may determine whether the student has discerned the roots of human life and of human society.

At some stage in his education, and I should hope in his study of metaphysics and the philosophy of nature, the student should learn that in order for a thing to change it must first be and that the causes of its being are not the same as the causes of its changing. In terms of the concepts of being and becoming and the analysis of causes, he will not only understand the principles of physical existence, but will know also that matter alone is not enough to explain the world. He will be able to correct the exaggeration of those who hold that everything is in flux and to moderate the excesses of those who say either that whatever happens is necessarily determined or that everything is contingent or a matter of probability. From a knowledge of being he will have passed to the study of the nature of truth and goodness. Hence, he will be able to withstand the skeptic and the sophist; he will know that everything is not a matter of opinion; that the truth is not what suits our convenience or prejudices; that the good is not a matter of taste. He will know that man is not the measure of all things, but that man is measured by the truth, which is the conformity of his intellect to reality, and by goodness, which is the conformity of his will to objective moral standards.

With this theoretical background acquired in psychology and metaphysics the student is prepared for the study of the practical disciplines of ethics and politics. He should face them understanding that there are standards of good and bad, that morality is not reducible to the mores, and that custom is not the test of what is good. And since what is good in general depends upon the nature of being, and what is good for man depends upon the nature of mankind, he will be aware that the permanence and universality of the moral order has a natural basis. If, then, ethics is well taught the student will come to see the relation of the virtues to external goods: riches, honors, and pleasure; and the relation of the virtues to happiness. He will see that the essential terms of the moral problem are not affected by scientific advance, economic cycles, or political change. If politics is well taught, he will come to regard the state as an organization for the common good. He will understand how the individual is subordinate to it and how it serves the good of each individual. He would understand the meaning of law and the meaning and significance of justice. In this connection he would see that a just society requires economic sufficiency and a fair distribution of external goods; for the proper study of ethics and politics must prepare the student for the moral and political problems raised by the insistent economic needs of men.

Economics, therefore, though it may seem to be concerned only with business and property, must be taught as a moral discipline subordinate to ethics and politics. The acquisition and distribution of wealth must be studied in the light of the ends of the state and of the individual.

The study of history must be regulated by all these truths. This means that the student must see how changing societies have embodied enduring principles in different ways; how far short most societies fall from the ideals of mankind; and how qualified must be the optimism which signs of progress induce. Since his study of history should assist him to understand the nature and activities of men, it should not be taught as a mass of details united only by temporal or geographic considerations. It must be informed by an understanding of men and society.

The prospective lawyer should learn to read, write, and speak, abilities much less common in this country than is ordinarily supposed. In this process he should discover not how we think, but how we should think. He should develop standards of judging thinking, even his own. He should learn the difference between honest thinking and sophistry, between reasoning and rationalization, between the formulation of truth and recasting it for the purpose of persuading others. Above all, he should be disciplined to discriminate the relevant, to argue to the point, and to place his reliance upon the weightier evidence and the better reasons.

Legal history and legal philosophy are of course controlled by what I have said of history and philosophy generally. I shall add here only that legal history should not be confused with legal philosophy. The student is not taught legal philosophy if it is regarded as a scheme for rationalizing legal policies according to the prejudices of their time and place. There is no truth in the philosophy of law unless it is the same truth for all legal systems at every epoch. In the philosophy of law and in all legal subjects we must remember that it is inadequate to hold that the law is what the courts will do; that legal education cannot consist of memorizing rules, and that justice is the primary concern of the lawyer and hence of the law student. How far we are from this view today is revealed by a passage from an article by Professor Max Radin in the current number of the California Law Review. He says, "There is scarcely any teacher of law who has not been confronted at some time in his career with a student who objected to a decision, because he thought it was unjust. The approved method of dealing with such a student is to pour contempt upon him and to treat his objection as not merely irrelevant, but slightly stupid." We must all share Professor Radin's horror at this situation.

The questions I have enumerated are some of those which the prospective lawyer should be forced to face. Today it is perfectly possible to go through a good college and a good law school without hearing any of them mentioned. We might hope that a student who had been forced to face them would be able to understand legal rules and criticize them intelligently. He

would be able to fit his information about law and society into some comprehensible scheme of things. What the courts have done might make some sense to him, and the facts of life might at last become intelligible. He would have some inkling of what it should mean to be a member of that learned profession through which justice is done. As Professor Morris Cohen has put it in his article, *On Absolutisms in Legal Thought,* "We cannot maintain sound intellectual procedure by turning our backs on critical logic; we cannot attain clear ideas as to the nature of the factual or real world by ignoring that obstinate effort to think clearly which is the core of metaphysics; and we cannot arrive at a clear idea of what it is that we really wish to achieve without the clarified vision of the *summum bonum* which is the subject matter of critical ethics . . . It is only when law is . . . seen as a part of the life of reason that the ideal of a just law can become a real force for genuine beneficence."

The educational requirements of the bar are now directed to seeing to it that the future lawyer gets more education. We have seen that it is not a question of the amount of education but of the kind of education. We already have more of the education that is going than almost anybody else. Yet we must be dissatisfied with our moral and intellectual caliber. It would seem to follow that we do not need still more of the education that is going; we need to move into a different moral and intellectual atmosphere. We need an education that will guarantee that we face fundamental intellectual and moral issues and that we emerge from our consideration of them with the moral and intellectual habits which our people may properly insist that lawyers have.

There is no doubt that the bar can get this kind of education if it wants it. In the long run the legal education that is given is dictated by the bar. No program of legal education can succeed unless it can win its support. If a school cannot secure the endorsement of the profession, it will finally have no students at all. Law professors know this very well, so well that it is their standard argument against any improvement in legal education. If the bar wants educated lawyers, it can get them by making its wishes known and enforcing them through its control of the rites of admission.

The bar cannot evade this responsibility by saying that it cannot be any better than the country will permit it to be, that lawyers must live, and that in order to live they must take their morals from their clients. This appears to be Professor Radin's sad conclusion in the article I have already quoted. After saying that the lawyer's business is with justice, he goes on to remark, "But in the last analysis, justice is a communal valuation, and not the special function of a professional class. This valuation is often imposed by the moral leadership of certain individuals or certain groups. It is highly unlikely, unfortunately, that the community will ever accept the lawyers as such a group . . ." If justice, in Mr. Radin's phrase, is a communal valuation often imposed by the moral leadership of a certain group, why is the community unlikely to accept the lawyers as such a group? As a matter of fact, the community has from the beginning accepted the leadership of the lawyers as a group. If they now seem to hesitate about continuing to accept it, it may be because they are disillusioned about lawyers. Certainly lawyers are becoming daily more and more like businessmen. The learned protession we represent is becoming more and more like a trade. I do not need to ask you which is more complimentary to a lawyer, to say that he is a scholar or to say that he has made a lot of money. In my opinion the lawyers still command sufficient respect to impose on the country their conception of justice, but unless they do something pretty promptly they will not command it long. If they continue to accept what is done as the standard of what to do; if they continue to seek large fees under the impression that they are the common good; if legal ethics means little more than a protective tariff in favor of the bar; if we are regarded as the spokesmen of special privilege; if our chief claim to public admiration is our agility in making the worse cause appear the better, then we are lost; then we cannot hope to make the community accept our moral leadership.

All this is not as remote from the burning issues of labor, capital, the constitution, the judiciary, communism, fascism, war, and peace as may at first appear. These great problems revolve around the very questions which we wish the prospective lawyer to face intelligently and in which he is now untrained, questions affecting the ends of economic activity, of organized society, and of human life. If our leadership is to continue, we must be worthy of our trust. We must make that leadership intelligent and courageous. We must understand what kind of people lawyers must be, and we must try to see to it that our successors, at least, are that kind of people. What the American bar needs is a tradition and an education. It now has neither that is adequate to its task. If its education is of such a sort as to help it comprehend and execute its obligations, we can hope in time for a tradition, too. The bar has led our people into the wilderness. Armed with a tradition and an education, it may yet lead them out.

FULL PUBLIC HEARING ON JUDICIAL NOMINATIONS

Senator Bridges of New Hampshire has introduced in the Senate of the United States the following Resolution:

"Resolved, That Rule XXXVIII of the Standing Rules of the Senate is amended by adding the following new paragraph:

"7. Every nomination for judicial office shall be referred at once to the Committee on the Judiciary and such Committee shall in every instance afford a full public hearing upon all matters touching the fitness and qualifications of the nominee for the judicial office."

This will be recognized as embodying the recommendation originating in the Assembly at Kansas City, unanimously reported by the Resolutions Committee, and unanimously adopted by the Assembly and the House of Delegates. Members of the Association, along with other citizens, who believe that such a provision should be adopted as to nominations to the Federal Courts, including the Supreme Court, will do well to communicate their views to members of the Senate. It has been estimated that the adoption of this rule would usually require from thirty to forty public hearings by the Senate Committee on the Judiciary during a session of the Congress.

*Series of Eighteen Striking Mural Pa*mplete

AFTER working for two years and seven months, Boardman Robinson has completed the installation of a series of mural panels in the Ceremonial Entrance leading from the Court of Honor in the Department of Justice Building, Washington, D. C. The murals, tempera on canvas, cover 1,025 square feet and constitute the largest group of panels executed by a single artist under the Treasury Department Art Program.

The murals are done in eighteen panels depicting the great law-givers of history with two center panels portraying the signing of the Magna Charta and the Constitution of the United States. Of particular interest is the fact that Mr. Robinson spent seven months in research before attempting any sketch.

The individual panels begin with the earliest recorded historic law-giver, Menes, the ancient king of Egypt, and beyond whose dynasty history is unrecorded. The panels then carry us through the ages to Associate Justice Oliver Wendell Holmes and are broken at two points by the depiction of the signing of the Magna Charta and the Constitution of the United States. The jovial artist concedes that his selections may be subject to controversy, but is satisfied that he did his best as a layman to include the most important ones. His individuality is clearly emphasized when one questions little touches in the panels that appear to have no relation to the subject. For example, behind the portrait of Blackstone appears a very grotesque bust. This he has laughingly termed Mr. Justice Precedent because of the frequent reference to precedent in the volumes he studied.

Justinian is portrayed holding in his right hand a mask, which Mr. Robinson attributes to the fact that Justinian's outward appearance belied the character that hid behind a "mask of piety."

In his preparation for painting the features of Victoria, the Dominican monk, he was unable to find in

Completed for Department of Justice Building

any library a description or drawing of Victoria's features and in his resourcefulness used the likeness of a great present day student of the works of Victoria, James Brown Scott, Secretary of the Carnegie Endowment for International Peace, contending that such an authority must in some way resemble this great lawgiver.

His panel on the Constitution indicates considerable study of the subject in his depiction of those present when it was signed. The Magna Charta depicts King John's subjection to the will of the people at Runnymeade and all of the characters depicted therein are the product of his imagination with the exception of the King, the Archbishop of Canterbury, and his self-portrait in one of the corners as a farm servant attending this epochal meeting.

The complete eighteen panels are as follows: 1. Menes. 2. Hammurabi. 3. Moses. 4. Solon. 5. Justinian. 6. Papinian. 7. Grotius. 8. Thomas Aquinas. 9. Victoria. 10. Sir Edward Coke. 11. Chancellor Kent. 12. Blackstone. 13. Marshall. 14. Oliver Wendell Holmes. 15. Jesus. 16. Socrates. 17. The Magna Charta. 18. The Constitution.

Paintings and drawings by Boardman Robinson are included in the permanent collections of the Metropolitan Museum of Art, the Whitney Museum of American Art, the Detroit Museum of Art, the Denver Museum of Art, etc. Since 1930 Robinson has been art master at the Fountain Valley School for Boys, Colorado Springs, and Art Director of the new Fine Arts Center in the same city. The selection of Boardman Robinson to decorate the Ceremonial Entrance of the Department of Justice Building, was determined on the basis of the large number of votes which he received from a National Advisory Committee working with the Section of Painting and Sculpture.

THE ADMINISTRATION OF JUSTICE AS AFFECTED BY INSECURITY OF TENURE OF JUDICIAL AND ADMINISTRATIVE OFFICERS

ESSAY WHICH RECEIVED THE AWARD FOR 1937 IN THE COMPETITION UNDER THE TERMS OF THE BEQUEST OF THE LATE JUDGE ERSKINE M. ROSS*

By Elwood Hutcheson
Member of the Yakima, Washington Bar

THE administration of justice is the principal function of government and the most important responsibility in politically organized society. The stability of the state and the cherished rights, liberties and welfare of the individual citizen in a democracy rest largely upon the impartial, prompt and effective administration of justice.[1] Never before has this been more manifest than it is today with our modern, increasingly complex social, political and economic conditions and problems. Today more than ever before, our courts are the safeguard of security, personal liberty and property, and the last bulwark of the threatened constitutional rights of the individual citizen.

The keystone of the arch of the temple of justice is the judge who sits upon the bench. His day's work is the dispensation of equal justice under law between man and man and the state. If this is done poorly, justice languishes and dies. If his judicial duties are well performed, justice is triumphant. In the determination of public and private controversies justice substitutes the principle of right for that of might. And the moral force and rightness of justice depend largely upon the ability and integrity of the judges who preside over our courts of law.

Wise and just substantive laws, effective and reasonable rules of procedure, adequate court organization —all of these are important and necessary. But in the final analysis, justice depends upon the judge, and it is principally upon a well qualified personnel of the judiciary that we must rely for an efficient and impartial administration of justice without fear or favor.[2] And without such qualified judicial personnel any attempted administration of justice is doomed to dismal failure. "Given a judge of sound judgment, learned, courageous and independent, and justice will be well administered under almost any system of laws. Given a judge unlearned, timid, and whose horizon is the next election, and justice will be poorly administered under the best system of laws."[3]

It is natural, therefore, that in recent years the bench and bar have been devoting more and more attention to the profoundly important subject of improvement of the methods of selection and tenure of judicial and administrative officers. This subject has been debated and discussed since the beginning of our government. In the last five years, however, there has been more active discussion and planning with reference thereto than in half a century.[4] No problem of greater importance or more widespread interest confronts the American bar today.

Since 1933 this has been one of the four subjects selected as the basis of the National Bar program of the American Bar Association, which has rightfully assumed leadership in the solution of this vexing problem. For years the principle of an appointive judiciary with security of tenure has been diligently advocated by the American Judicature Society, and there has been a committee studying the problem in the Conference of Bar Association Delegates; and in the past year such a committee has been created in the American Bar Association.[5] The subject has been ably discussed in the last two annual addresses of the presidents of that Association.[6] The time is now ripe for carrying forward this salutary movement. Before considering the reasons underlying the same, which are familiar to bench and bar, let us briefly survey the historical background.

I

Judges are selected by appointment rather than popular election in all countries except the United States and Switzerland. In England the insecurity of judicial tenure under the Stuarts—due then not to the whim of the public, but to the whim of the crown—was one of the principal evils culminating in the Revolution of 1688. As a result thereof, through the Act of Settlement, which was adopted twelve years later, security of tenure through executive appointment for life or during good behavior became firmly established in the mother country, and was brought by the colonists to American shores.[7] Interference by the crown with that security of tenure was emphasized in the Declaration of Independence as one of the causes of the sep-

*Read at Thursday morning session of Assembly at Kansas City, Mo.

1. Compare: Chief Justice Taft, 5 Jour. Am. Jud. Soc. 37 (1921); and Martin, "The Role of the Bar in Electing the Bench in Chicago" (1936), p. 3.

2. Compare: Pound, "Toward a Better Criminal Law," 21 A. B. A. J. 499 (Aug. 1935); Hall, "The Selection, Tenure and Retirement of Judges," Bulletin X, Am. Jud. Soc. (1915), p. 4; and McCormick, "Judicial Selection—Current Plans and Trends," 30 Ill. L. Rev., 446 (1935).

3. Wood, Report of Judicial Selection Committee, Conference of Bar Association Delegates, 1935, p. 13.

4. Compare: 20 Jour. Am. Jud. Soc. 190 (Feb. 1937).

5. 22 A. B. A. J. 666, 698, 710 (Oct. 1936)

6. Loftin, "The Independence of the Judiciary" 21 A. B. A. J. 469 (Aug. 1935); and Ransom, "Some Impressions of American Lawyers Today," 22 A. B. A. J. 663 (Oct. 1936).

7. McCormick, "Judicial Selection—Current Plans and Trends," 30 Ill. L. Rev. 446 (1935); Haynes, "Selection, Tenure and Retirement of Judges," 7 Cal. St. Bar Jour. 88 (1932).

aration.[8] To avoid repetition of this evil, so antagonistic to an effective administration of justice, the framers of the Federal Constitution expressly provided therein that federal judges "shall hold their offices during good behavior and shall at stated times receive for their services a compensation which shall not be diminished during their continuance in office."[9] Thus was established upon the solid rock of security of tenure our federal judiciary, which has been, with some notable exceptions, the embodiment of learning and integrity and the pride of our American judicial system.

Originally the colonial and state judiciaries were likewise selected through executive or legislative appointment to serve during good behavior.[10] Several decades later, however, most of the states, especially to the west of the Atlantic seaboard, in their more or less pioneer environment, through the application of Jeffersonian principles of popular election during the Jacksonian era, departed from that appointive method and adopted the popular elective system, which has since been in vogue. This shift has been attributed to the popular hostility which developed toward some strong life-tenure judges who tenaciously adhered to English rules and precedents notwithstanding the temporary unpopularity of English law following the Revolution.[11]

Opposition to the courts was increased by a public feeling that their attitude was unfriendly toward the debtor class.[12] This feeling was accentuated following the establishment in Marbury v. Madison of the doctrine of judicial review of the constitutionality of legislation.[13] Attempts to check the exercise of judicial power have usually taken the form of assaults upon the security of judicial tenure.[14]

Consequently during the first half of the nineteenth century there developed a rising tide of public sentiment against the appointive life tenure judiciary. Under the spell of the doctrine of popular sovereignty, espoused during the Jacksonian period, which crystallized the reaction against the judiciary as then constituted, the method of popular election of judges for short fixed terms became generally prevalent. The movement was foreshadowed in the original Constitution of Ohio in 1802, which, although adhering to legislative appointment of judges, limited the term of office to seven years. In 1830 the elective short term principle was adopted in Alabama and in 1832 in Mississippi, and from that time until the beginning of the Civil War, the same was adopted in twenty-two of the thirty-four states then established. Popular elections and short tenure were adopted in all of the fourteen states established since the Civil War.[15]

8. It was therein complained that the King had "made judges dependent upon his will alone for the tenure of their offices and the amount and payment of their salaries." This is referred to in O'Donoghue v. United States, 289 U. S. 516, 531, 77 L. ed. 1356, 1361.

9. Federal Constitution, Art. 3, Sec. 1.

10. Martin, "The Role of the Bar in Electing the Bench in Chicago" (1936), pp. 3 and 4; Carpenter, "Judicial Tenure in the United States" (1918), p. 156, et seq.

11. Pound, "Criminal Justice in Cleveland" (The Cleveland Foundation, 1922), p. 600; Martin, "The Role of the Bar in Electing the Bench in Chicago" (1936), p. 4.

12. Carpenter, "Judicial Tenure in the United States" (1918), p. 172.

13. 1 Cranch, 137 (1803). Compare: Martin, "The Role of the Bar in Electing the Bench in Chicago" (1936), p. 4; and Carpenter, supra, note 12, p. 163.

14. Carpenter, supra, note 12, p. v.

15. Martin, "The Role of the Bar in Electing the Bench in Chicago" (1936), p. 5; Carpenter, "Judicial Tenure in the United States" (1918), pp. 157 to 185; McCormick, "Judicial Selection—Current Plans and Trends," 30 Ill. L. Rev. 446 (1935).

II.

At present the elective method is operative in thirty-six states.[16] Judges are appointed by the governor with confirmation by the senate or council in five states, Massachusetts, Maine, New Hampshire, Delaware and New Jersey; and appointed by the legislature in five states, Connecticut, Rhode Island, South Carolina, Vermont and Virginia.[17] In Florida the judges of the supreme court are elected and those of the principal trial court are appointed by the governor. In California under the recent constitutional amendment of 1934 the supreme and appellate court judges are appointed by the governor, with confirmation by a small council, and trial court judges are elected. Judicial tenure is for life or during good behavior in only the federal judiciary and four states, Massachusetts, Connecticut, New Hampshire and Rhode Island; and for a term of office more than ten years in only Maryland, New York and Delaware, and as to appellate judges in Pennsylvania, California, Missouri, Virginia, West Virginia and Louisiana.[18]

Little did the advocates of the elective short-term method before the Civil War foresee the many changes which have subsequently occurred in American life, and the far-reaching effects that these changes have had upon the selection and tenure of judges. New unforeseen forces and conditions arose—the phenomenal expansion of industrialism and manufacturing, the growth of large cities, the development of partisan spoils politics—which materially affected the entire legal system. The method of electing judges for short terms was not designed for, and proved itself wholly inadequate to cope with, these new conditions.[19]

As is well stated by Dean Roscoe Pound:

"In rural pioneer America the elective short-term judge did not work badly. . . . Today judges in rural jurisdictions chosen at the polls and for relatively short terms are, on the whole, satisfactory. But the elected short-term bench has not achieved what its adherents expected of it, and has achieved some other things which have a bad influence upon the administration of justice."[20]

Industrialism, urbanism and the modern automobile produced a tremendous increase in the volume and complexity of litigation. The growth of large cities was accompanied by notable increase in crime and overburdened courts. New tribunals were created and the number of judges was increased. The problem of electing judges came to involve the selection of numerous judges by large, heterogeneous electorates, having little knowledge of the qualifications required for judicial office, and especially having little or no realization of the presence or absence of those qualifications on the part of numerous competing candidates.[21] Under modern metropolitan conditions the electorate lacks the knowledge required to vote intelligently and discrimi-

16. These states are enumerated with the dates of its adoption in Martin, "The Role of the Bar in Electing the Bench in Chicago" (1936), p. 5.

17. Martin, "The Role of the Bar in Electing the Bench in Chicago" (1936), p. 336; Haynes, "Selection, Tenure and Retirement of Judges," 7 Cal. St. Bar Jour. 88 (1932).

18. Haynes, "Selection, Tenure and Retirement of Judges," 7 Cal. St. Bar Jour. 88 (1932).

19. Merriam, "American Political Ideas," p. 152; Martin, "The Role of the Bar in Electing the Bench in Chicago" (1936), p. 6.

20. Pound, "Criminal Justice in Cleveland" (The Cleveland Foundation, 1922), p. 599.

21. Martin, "The Role of the Bar in Electing the Bench in Chicago" (1936), p. 7.

natingly.[22] The voters are helpless when asked to determine by their ballot those qualities of character, learning, courage, and judicial temperament that go to make up a good judge, especially when there are numerous competing candidates.

This unfortunate situation has been intensified by the rise of the well known class of professional politicians to manage and manipulate the political party system, especially in large metropolitan centers where rich inducements abound.[23] Their increasing deleterious influence has been facilitated by the long list of public offices to be filled, the endless numbers of competing candidates, the preoccupation of the voters with their private affairs, and the increasing inertia, ignorance, and disillusionment of the electorate.[24] The result has been that in the large cities particularly, the so-called system of popular election of judges has been a sham and a farce, and the people have not in fact elected the judges, but have merely for the most part formally placed in office the candidates selected by these politicians, who, unfortunately, are irresponsible and primarily interested in their own concerns rather than the public welfare.

The situation has been still further aggravated by the direct primary. For example, during a six-year period from 1925 to 1930 in the city of Chicago alone, a voter had to choose between 423 candidates for 146 judicial offices in eighteen different elections, or an average of nearly thirty candidates per election.[25] It is of course impossible for the electorate to vote intelligently upon the election of judges under such circumstances.[26]

Upon the old party politics the direct primary has superimposed personal politics, requiring the judicial candidate to stoop even lower. The representative principle and party discipline and responsibility, which were found under the former convention system, have largely disappeared. The candidate must now make his appeal, not to a representative convention of delegates, but to the general public, most of whom are utterly incapable of judging his merits as a jurist or comparing his qualifications with those of other candidates. Both responsibility and the capacity for wise selection are to a great extent lacking. A candidate's nomination and election must now depend largely upon his power to obtain votes, which is of course a wholly inadequate test of judicial fitness.[27]

Moreover these evils have been further aggravated by the relations of the press with the judiciary, which have adversely affected the administration of justice and the prestige of the courts. There has arisen that disgrace to our judicial system commonly known as "trial by newspaper," which has contributed so largely to bringing our courts into public disrespect and rendering inefficient the enforcement of our criminal law. This results from the exaggerated sensational dissemination of news of court trials, arising from the demoralizing effect of politics. Many judges, as well as prosecuting officials, welcome publicity as an aid to obtaining votes and are reluctant to offend newspaper men whose favor is desirable. The newspaper men desire news and can give publicity. The resulting cooperation between them is a serious reflection upon the dignity and prestige of our courts.[28]

The present situation is succinctly summed up by Herbert Harley, Secretary of the American Judicature Society, as follows:

"For many of them it is a cruel choice between short careers and activities on and off the bench which will keep them in the public eye. . . . Another matter could be called the agonies of the metropolitan bench. . . . All really sophisticated lawyers know that popular election of judges in the largest cities has been steadily lowering the quality of personnel for many years and that the lower stratum is nauseous."[29]

Too frequently political considerations outweigh judicial fitness in the election of judges. Too frequently we have the shocking and disgusting spectacle of a judicial election when dignity and reasonable discretion are thrown to the winds and we see competing candidates advertising by billboard, newspapers, and radio such contemptible slogans as "human rights above property rights," "justice tempered with mercy," "the friendly judge," and "he favors the Townsend Old Age Pension Plan." Is it any wonder that courts, judges and law have fallen into public disrespect?[30]

Under the short-term elective system a judge is forced to become a perpetual candidate and to engage in a great deal of outside activity in order to be in the public limelight, which greatly impairs not only his dignity and prestige, but also his efficiency as a judge upon the bench. He is also required in the larger cities to be more or less constantly associated with his sponsor, a partisan group.[31] The development of permanent organizations within the political parties has enabled them practically to monopolize the nomination and election of judges.[32] An investigation in Chicago, for example, has clearly demonstrated that as a rule no judicial candidate is nominated or elected without political organization sponsorship; and that political parties appear to regard judicial qualifications of candidates only as incidental to many other elements of political strength and "vote-getting ability," which have little relation to judicial capacity.[33]

After every metropolitan election the slogans of judicial independence and of equality before the law have a hollower ring. Friendship or kinship of the judicial candidate with ward political leaders, his services and contributions to the party, his particular racial extraction, his general mixing and "vote-getting ability" —these elements unfortunately as a rule have far greater weight in judicial selection than an intelligent

22. Martin, supra, note 21, p. 248; Laski, "The Technique of Judicial Appointment," 24 Mich. L. Rev. 529 (1926); Laski, "Studies in Law and Politics" (1932), ch. 7.

23. Compare: Carpenter, "Judicial Tenure in the United States" (1918), p. 184.

24. Martin, supra, note 21, p. 7.

25. Martin, supra, note 21, p. 18.

26. Anderson, "The Selection of Judges," 9 Cal. St. Bar Jour. 113 (1934).

27. Compare: Perry, "Politics and Judicial Administration," 17 Jour. Am. Jud. Soc. 138 (Feb. 1934); and Annals Am. Acad. Pol. & Soc. Sci. (Sept. 1933); Hall, "The Selection, Tenure and Retirement of Judges," Bul. X, Am. Jud. Soc. (1915), p. 10.

28. Perry, "Politics and Judicial Administration," Annals Am. Acad. Pol. & Soc. Sci. (Sept. 1933), and 17 Jour. Am. Jud. Soc. 137 (Feb. 1934).

29. Harley, 17 Jour. Am. Jud. Soc. 77 (Oct. 1933), quoted in Martin, "The Role of the Bar in Electing the Bench in Chicago" (1936), p. 7.

30. Wood, Report of Committee on Judicial Selection, Conference of Bar Association Delegates (1935), p. 13.

31. Martin, "The Role of the Bar in Electing the Bench in Chicago" (1936), p. 48.

32. Martin, supra, note 31, p. 249.

33. Martin, supra, note 31, pp. 249, 310. For an excellent discussion of partisan politics and judicial elections see Martin, supra, note 31, pp. 248 to 310.

consideration of his judicial fitness and qualifications.[34]

The lamentable failure of the elective system is confessed by a keen student of the subject, Professor McCormick, in the following words:

"The tradition which comes down as a legacy from our ancestral inheritance of a learned, strong, and fearless judiciary has lingered long after the reality has disappeared. . . . In the metropolitan area the collapse of the theory of selection of judges by the people is complete."[35]

The burden thrown upon the electorate in choosing among a host of candidates those best fitted for office has been so great that the elective system as applied to the judiciary has broken down.[36] The interest of the voters is far too mild to induce them to devote the time and energy necessary to inform themselves of the relative qualifications of numerous candidates, as is necessary in order to vote intelligently. In the Cook County judicial election of June, 1933, for example, there were seventy candidates for judicial office. Under such circumstances, while there may be popular election of judges in name, nevertheless an intelligent election of judges by the people under such circumstances is a practical impossibility. The real choice of course was made by the political leaders who made out the party tickets. There is in fact appointment rather than election of judges; the appointing power being lodged, however, in irresponsible political leaders.[37] The so-called popular election of judges is at best an appointment by irresponsible political party leaders or a popular choice between such appointments, and at worst selects merely a clever campaigner without judicial qualifications.[38]

After a full discussion of the subject at the Cincinnati conference on the selection and tenure of judges in 1934, it was voted overwhelmingly that there is a widespread dissatisfaction with the personnel of both trial and appellate state courts and with the present method of selecting judges by popular election, due in large degree to the fact that the judges are subjected to political and personal influences, which seriously impair the administration of justice, and also due secondarily to want of legal ability, lack of industry, and timidity.[39]

On the other hand, experience with an appointed judiciary in England, under the federal judiciary, and in the states where tried, particularly Massachusetts, New Jersey and Delaware, has been very favorable.[40]

In 1934 a questionnaire was extensively submitted to 128 bar associations in thirty-five states on behalf of the American Bar Association under the direction of Will Shafroth, who summarizes the very significant result as follows:

"Lawyers in states where the judges are appointed by the governor or chosen by the legislature are strongly opposed to any change in the existing system, while the profession in those jurisdictions where the judges are elected is unsatisfied with present methods and wants something else."[41]

III.

The present short-term elective method has not only been a deplorable failure, but it is unsound in principle. On the other hand, a judiciary selected through executive appointment with security of tenure is thoroughly consonant with fundamental principles of American government. This is not a pure democracy. In the executive and legislative branches numerous officials are selected by appointment upon the representative principle. Why should that principle not be applied in the selection of the judiciary? As a matter of fact, the very reasons which impel direct election in the other branches do not apply to the judicial branch. The contrary contention is based upon a misapprehension of the basic principles of representative government. A judge is not in the usual sense a servant of the people but is a judicial officer of the government, a guardian of the Constitution, an independent and impartial "umpire in the game of litigation."[42] There is not involved any question of popular rule, but rather how may be secured the most efficient government and the most effective administration of justice.

Let us not overlook the complete diversity of functions of the different departments of government. It is only the legislative and executive departments which are to represent and give effect to the majority public opinion. It is not the function of the judiciary to represent the current views of the majority of the electorate nor even necessarily the views of the other branches. If the high functions of the courts are to be properly performed, they must at times declare against the popular view and impose a check upon the tyrannical power of the temporary majority. They must stand always in support of the lawful and constitutional rights of the individual American citizens. "Legislators are agents of the people to make their laws, but the people can have, in the nature of things, no agency in the decision of litigation."[43]

Therefore the basic reason for direct popular election as applied to legislative and executive officials is wholly inapplicable in the selection of judges. They should be above the demands of majorities and the voice of popular clamor. Their duty is to support and enforce the Constitution and laws as they are, regardless of all other extraneous considerations. Consequently, far from being subject to popular election, judges should be made independent and safe against the demands and influence of politicians, special interests, and the whim of the temporary majority. A restoration, therefore, of the principle of appointment of judges with security of tenure certainly is not a departure from the fundamental principles of American government, but on the contrary is a return to the basic principles upon which our Constitution is founded.[44]

34. McCormick, "A Proposed Reorganization of the Illinois Judiciary," 29 Ill. L. Rev. 31 (1934).

35. McCormick, supra, note 34.

36. Carpenter, "Judicial Tenure in the United States" (1918), p. 209.

37. McCormick, "A Proposed Reorganization of the Illinois Judiciary," 29 Ill. L. Rev. 31 (1934); Carpenter, "Judicial Tenure in the United States" (1918), p. 184.

38. Hall, "Selection, Tenure and Retirement of Judges," Bul. X, Am. Jud Soc. (1915), p. 12; Kales, "Method of Selecting and Retiring Judges," 11 Jour. Am. Jud. Soc. 134 (1928); Report of Judicial Selection Committee, Conference of Bar Association Delegates (1935), p. 23.

39. Luberger, "Selection and Tenure of Judges in Ohio," 8 Univ. of Cincinnati L. Rev., pp. 359 to 532, and particularly 494 (1934).

40. Hall, "The Selection, Tenure and Retirement of Judges," Bul. X, Am. Jud. Soc. (1915), p. 10.

41. Shafroth, "The Bar's Opinion on Judicial Selection," 20 A. B. A. J. 529 (Sept. 1934).

42. Carpenter, "Judicial Tenure in the United States" (1918), p. 196.

43. Gambrell, "Miscellaneous Methods of Judicial Selection," 19 A. B. A. J. 671 (Nov. 1933).

44. Compare: Judicial Selection Committee Reports, Conference Bar Association Delegates (1935), p. 27 and (1936) p. 11.

IV.

It is not difficult to perceive the principal underlying cause of the failure of the short-term elective method. The fundamental defect of the present system is that, in conjunction with an inadequate method of selection of judges, it is founded upon the shifting sands of insecurity of tenure.[45] It is but natural that the resulting worry and anxiety over the constantly approaching election prevents the efficient performance of judicial services by the judge upon the bench. When a judge takes office, his law practice becomes scattered and lost, his clients become attached to other attorneys. He knows that if he is defeated for re-election by any of the opposing candidates, he will be turned out of office without a salary or brief and without an established clientele. He knows that at his relatively advanced age, when he has lost the energy and zeal of youth and acquired the sober judicial state of mind rather than that of the aggressive advocate, it is extremely difficult again to build up a law practice. No judge can do his best work under such circumstances. Judicial serenity is essential in order to have judicial efficiency and an orderly administration of justice.[46] Insecurity of tenure is fatal to a proper judicial habit of mind.[47] In order to have an effective administration of justice, we must have judges who have security of tenure and are free from political worry and anxiety. In the great American problem of improving the administration of justice, the important factor is not measures but *men*, and in order to have good judges, there must be greater security of tenure.[48]

Of course we wish to emphasize that not because of, but in spite of, these deplorable conditions there are many judges throughout our nation of the highest ability and character who have been elected to office. Their high standing is a credit to themselves and to their electorate, but not to the system of short-term popular election of judges. It would seem obviously wise to improve our mode of judicial selection and tenure if thereby we may obtain a larger number of judges like them. The method of selection must, however, be judged by its failures. Many of them are so deficient in judicial capacity and qualifications as to conclusively condemn the system which elevated them to judicial office.[49]

Moreover the present elective system is unfair to the judges, as well as detrimental to the public. As hereinabove stated, no judge can properly and efficiently do his best work if he knows that soon he must again face the voters and run for re-election against a flock of competing candidates. Insecurity of tenure directly saps the efficiency of judicial service and substantially impairs the administration of justice.

Furthermore it is a well known fact that insecurity of tenure, in conjunction with inadequate judicial salaries, deters and prevents many able lawyers from seeking judicial office. Insecurity of tenure every year robs the bench of numerous well-qualified men who would otherwise gladly become judges and who would as such serve with distinction and be a credit to our judiciary.[50] They are not interested, however, because of the insecurity of tenure, their abhorrence of politics, and their aversion to engaging in a political and personal campaign for judicial office. Their repugnance to the unpleasant and distasteful political activity and publicity-seeking, necessary in order to be elected and retain the office, is even a greater deterring influence than inadequate salaries.[51] Security of tenure is essential in order to enable and induce lawyers of high ability to accept judicial office and in order to retain competent judges on the bench. It is a vital element in assuring the independence and competence of judicial work.

Therefore, especially in metropolitan centers, our courts are steadily retrograding. Due to insecurity of tenure, the independence of the judiciary, so essential to the effective administration of justice, is sadly disappearing. There can be no assurance of good judges under a judicial system which subjects them to the deleterious influence of politics and renders their tenure uncertain, insecure, and dependent upon perversive political pressure and the passing fancy of the majority of the electorate.

Too frequently we must confess that judicial office is in effect bought with money spent for press, billboard and radio advertising and for paid political workers. Even judges who have served the people conscientiously and well are frequently compelled to waste their time, energy and money in competition for their offices with unqualified but ambitious politically-minded candidates.[52]

Newton D. Baker has well said:

"The so-called popular election of judges as we have it now, does not work. . . . It is almost always true . . . that the man who has the best qualities for campaigning, has the least qualities for serving. The back slapper, the hand shaker, the baby kisser . . . are skilled along lines that least qualify them for such a job. . . . The judicial office is one requiring a set of qualities upon which lay judgment is relatively unimportant."[53]

What are the proper qualifications for judicial office? They are numerous, but important among them are legal learning, experience and knowledge of the law, character and integrity, fairness and impartiality, fearlessness and independence, industry and judicial

45. Of interest are the frequently quoted words of Chief Justice Marshall in the debates of the Virginia state convention of 1829-1830 (pp. 616, 619), quoted in O'Donoghue v. United States, 289 U. S. 516, 532, 77 L. ed 1356, 1361 (1933), and Evans v. Gore, 253 U. S. 245, 64 L. ed. 887 (1920):

"The judicial Department comes home in its effects to every man's fireside; it passes on his property, his reputation, his life, his all. Is it not to the last degree important that he should be rendered perfectly and completely independent, with nothing to influence or control him but God and his conscience? . . . I have always thought, from my earliest youth till now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people, was an ignorant, a corrupt, or a dependent Judiciary."

46. Compare: Baker, "Selection and Tenure of Judges in Ohio," 8 Univ. of Cincinnati L. Rev. 488 (1934).

47. Laski, "The Technique of Judicial Appointment," 24 Mich. L. Rev. 529 (1926).

48. Rufus Choate, address to Massachusetts Constitutional Convention of 1853, 17 Jour. Am. Jud. Soc. 10 (June 1933); Haynes, "Selection, Tenure and Retirement of Judges," 7 Cal. St. Bar Jour. 108 (1932).

49. Report of Judicial Selection Committee, Conference of Bar Association Delegates, 1935, p. 14.

50. Burke Shartell, "Retirement and Removal of Judges," 20 Jour. Am. Jud. Soc. 133 (Dec. 1936).

51. Report of Judicial Selection Committee, Conference of Bar Association Delegates, 1935, p. 14; Martin, "The Role of the Bar in Electing the Bench in Chicago" (1936), p. 322.

52. Compare: Reports of Judicial Selection Committee, Conference Bar Association Delegates, 1935, p. 14, and 1936, p. 11.

53. Report of Cincinnati Conference on Selection and Tenure of Judges in Ohio, 8 Univ. of Cincinnati L. Rev. 473 (1934). See also Gambrell, "Miscellaneous Methods of Judicial Selections," 19 A. B. A. J. 671 (Nov. 1933); Wilkin, "An Appointed Judiciary—Its Place in the Balance of Government," 23 A. B. A. J. 59 (Jan. 1937).

temperament.[54] A good judge should be neither arbitrary nor a respecter of persons in judgment, and should possess public confidence.[55] The judicial office is one which requires a high degree of expertness for its proper administration. As already pointed out, most of the electorate have only a vague understanding of what qualifications are required and little or no information as to the presence or absence of those qualifications in the various candidates for judicial office. The work of conducting a political campaign and the work of the judge upon the bench are as diametrically opposite as the poles. Is it not absurd to predicate our judicial system upon the theory that a public popularity contest is the best method of determining what judicial qualifications the various candidates possess?

"Election is not a test of merit but of popularity, and popularity involves many factors other than judicial fitness."[56] If the state were selecting an expert engineer to construct an expensive bridge or a teacher for its schools, he would not be chosen by the electorate through a popularity contest. Why then should the expert for the still more important position of administering justice in our courts be selected in that manner?[57]

The present deplorable situation is concisely summed up in the 1935 Report of the Judicial Selection Committee of the Conference of Bar Association Delegates[58] in the following words, which leave little necessity for further discussion:

"The expressions of the American Bar Association over the years, the research of the various state and local bar associations, the almost daily complaint of members of the bar, indicate that any extended argument against continuance of direct election of judges is supererogatory. The question is: what is to be done about it?"

There is a growing realization of the vicious imperfections of the present short-term elective method. Popular election of judges has been tried for approximately a century and in our large cities particularly has been found sadly wanting and is a hopeless failure. The bench and bar and to some extent the public are awakening more and more to the necessity of materially changing our method of judicial selection and tenure in order to remove the judges from the arena of practical politics, increase public confidence in our courts, restore the essential independence of the judiciary, and render the courts more effective instrumentalities for the administration of justice.

Certain mild palliatives or half-way measures have been proposed, but they are wholly inadequate to remedy the existing situation. The non-partisan judicial ballot has been advocated, but under such a proposal candidates for judicial office, even though not running as candidates of a certain political party, are as individuals immersed as deeply as ever in the mire of practical politics.[59] This method has reduced, but has not destroyed partisan control of the mode of selection.

Others advocate the bar primary and political activity of the organized bar preceding judicial elections. Undoubtedly the bar has been and can be of great aid to the electorate in furnishing information and advice as to the relative merits of judicial candidates.[60] But it is a noteworthy fact that it is in Chicago, Los Angeles and Cleveland, the three cities which have probably given this method the most thorough trial, that the bar, recognizing the futility and inadequacy of such a half-way measure, has in recent years taken an active lead in the reform movement for the adoption of an appointive rather than elective judiciary.[61] Unfortunately the bar primary can only differentiate the material to which it is applied. It cannot draft candidates nor improve their judicial fitness. It has no magic quality taking the place of a campaign to make known its findings. It is inadequate as a remedy as "it cannot rise higher than the source at which it commences or purify the defects of a polluted stream."[62]

V.

Much of what we have said herein is likewise applicable to administrative officers. We are now concerned, not with the many minor clerks and employes in the federal and state executive and administrative departments, performing solely executive functions, but only with those higher administrative officers, such as the members of more important state and federal commissions and boards, whose duties are of a judicial or quasi-judicial nature and relate directly to the administration of justice.[63]

During the last few decades we have seen the establishment of numerous such commissions and a tremendous movement for the transfer to them of functions previously exercised by the courts.[64] Among numerous familiar examples, of course, are the Interstate Commerce Commission, Federal Trade Commission, Board of Tax Appeals, Federal Securities and Exchange Commission, and innumerable state public service commissions, workmen's compensation boards, and similar administrative bodies. This extensive transfer of judicial and quasi-judicial duties to administrative officers has been due in large measure to public dissatisfaction with the courts on account of their decadence and greatly impaired effectiveness; and this in turn has

54. Compare: Martin, "The Role of the Bar in Electing the Bench in Chicago" (1936), p. 122; Hall, "The Selection, Tenture and Retirement of Judges," Bul. X, Am. Jud. Soc. (1915), p. 6; McCormick, "Judicial Selection—Current Plans and Trends," 30 Ill. L. Rev. 459 (1935).

55. Compare: Rufus Choate's Address to the Massachusetts Constitutional Convention of 1853, 17 Jour. Am. Jud. Soc. 10 (June 1933).

56. Perry, "Politics and Judicial Administration," 17 Jour. Am. Jud. Soc. 138 (Feb. 1934), and Annals of Am. Acad. Pol. & Soc. Sci. (Sept. 1933).

57. "No modern observer would be inclined to dispute President Lowell's assertion ("Public Opinion and Popular Government") that the ability of popular government to endure will depend upon its capacity to use experts. The administration of justice has always been a difficult and delicate function of the state, and as civilization develops, the complexity of the problem increases." Sunderland, "The Exercise of the Rule-Making Power," Rep. Am. Bar Assn. (1926), p. 277.

58. P. 14.

59. Compare: Harley, 17 Jour. Am. Jud. Soc. 9 (June 1933); Carpenter, "Judicial Tenure in the United States" (1918), p. 184.

60. See Martin, "The Role of the Bar in Electing the Bench in Chicago" (1936), pp. 21 to 310.

61. Harley, 17 Jour. Am. Jud. Soc. 9 (June 1933). On this and other phases of the subject, see also the able addresses by John Perry Wood and Charles M. Thomson, 23 A. B. A. J. 102, 105 (Feb. 1937).

62. Martin, "The Role of the Bar in Electing the Bench in Chicago" (1936), p. 112. See also 1935 Report of Judicial Selection Committee, Conference of Bar Association Delegates, pp. 21-23; Martin, supra, p. 363; McCormick, "A Proposed Reorganization of the Illinois Judiciary," 29 Ill. L. Rev. 31 (1934).

63. This distinction was noted in Humphrey's Executor v. United States, 295 U. S. 602 (1935). See also 23 A. B. A. J. 97, 102, 148 (Feb. 1937).

64. For excellent discussions of this general subject see McFarland, "Administrative Agencies in Government and the Effect Thereon of Constitutional Limitations," 20 A. B. A. J. 612 (Oct. 1934), the winning essay in the first annual contest under the Ross bequest; and Green, "The Administrative Process," 21 A. B. A. J. 708 (Nov. 1935).

been largely produced by the failure of the short-term elective method and insecurity of judicial tenure.[65]

In actual practice the judicial power of the United States is exercised by tribunals of three principal categories: In addition to the federal constitutional courts, consisting of the Supreme Court, the circuit courts of appeals and the district court, and the federal legislative courts, including the Court of Claims, the Court of Customs and Patent Appeals, the Customs Courts, the territorial courts, and the courts of the District of Columbia, as to all of which the judges are appointed and hold office during good behavior, there is a large group of so-called federal executive courts or administrative agencies consisting of seventy-three federal tribunals exercising judicial power in 267 classes of cases.[66]

With reference to the administrative officers in this large third group or category of federal tribunals, their tenure of office is in no case during good behavior nor are they protected against diminution of compensation or abolition of their offices. The tenure varies from a definite term of years, subject to removal for cause, to an employment subject to removal at any time at the whim of executive officials.[67]

It is apparent that the tenure of many of these administrative officers, some of them performing highly important judicial functions, is insecure, and that the results thereof are necessarily detrimental to the administration of justice and the efficient performance of duties by these officials. An even greater insecurity of tenure exists in the case of administrative officers in the states. A reasonable degree of security of tenure is essential in order to attract and retain able men as federal and state administrative officers and in order to facilitate the efficient performance of their duties, for the same reasons which we have previously discussed as to judges.

Obviously the independence of the administrative officer is sacrificed and the administration of justice is substantially impaired if an officer whose duties require him to decide judicial questions as between the government or the state and a private citizen is subject to removal by one of the interested parties. If a baseball umpire can be removed at the pleasure of one of the teams, his position is scarcely conducive to independence, impartiality or justice.

We must therefore heartily agree with the following conclusion reached in the 1936 report of the Administrative Law Committee of this Association:

"That just as great, if not greater, reason exists for securing a comparable independence for administrative agencies exercising judicial functions is apparent from the nature and importance of those functions, the peculiar difficulties and temptations under which such agencies labor, and the reasoning adopted by the Supreme Court in applying the constitutional provisions in particular cases."[68]

It may be noted that the pending proposal for the establishment of a Federal Administrative Court[69] rightly should and does involve the features of appointment of judges, to hold office during good behavior.[70]

An important milestone in the direction of greater security of tenure for such federal administrative officers is the recent decision of the United States Supreme Court in Humphrey's Executor v. United States.[71] It will be recalled that the court held that a Federal Trade Commissioner cannot be removed by the President before the expiration of his statutory seven-year term of office except for cause upon the statutory grounds of "inefficiency, neglect of duty, or malfeasance in office," and that the Act of Congress as so construed is constitutional. The court pointed out that it was clearly "the Congressional intent to create a body of experts who shall gain experience by length of service—a body which shall be independent of executive authority, except in its selection, and free to exercise its judgment without the leave or hindrance of any other official or any department of the government. To the accomplishment of these purposes it is clear that Congress was of opinion that length and certainty of tenure would vitally contribute."

Unfortunately, however, the decision in the Humphrey case was necessarily based, in the final analysis, upon the provisions of the applicable Act of Congress, and it has no application to the many administrative officers who do not have this statutory protection of a fixed term of office of substantial duration and a provision for removal only for certain specified causes. This is true, even though the same reasons for the desirability of independence and security of tenure recognized by the Supreme Court apply with at least equal force to such officers. Moreover, in actual practice, even as to agencies that do have such statutory protection, the decision does not prevent a large amount of interference or influence by executive officials and members of Congress in their judicial decisions, since the terms of office of their members are limited and they are in effect removed in any event unless from time to time reappointed.[72] Such reappointment of course is less likely if the decisions of the official have been unsatisfactory to the President or Senate or if there is a change of political administration.

But such administrative agencies with judicial powers are courts in fact, and in the exercise of judicial functions they should be free from influence by the executive or legislative departments. Where there is insecurity of tenure, with administrative officers as with judges, essential judicial independence is lacking.[73]

It is therefore concluded that, so far as reasonably possible, all of the more important federal administrative officers exercising judicial functions should have full security of tenure and should be appointed by the President, subject to confirmation by the Senate, to serve for life or during good behavior, subject only

65. Compare: McCormick, "Judicial Selection—Current Plans and Trends," 30 Ill. L. Rev. 446 (1935).

"The necessity for the establishment of some of these agencies might have been obviated by our seasonably dredging the existing channels of justice." Gambrell, "The Improvement of Administrative Law," 23 A. B. A. J. 93 (Feb. 1937).

66. Report of Committee on Administrative Law, American Bar Assn. (1936), p. 212.

67. See note 66, supra, p. 212.

68. P. 226.

69. See note 68, supra, pp. 244, 250; 23 A. B. A. J. 148 (Feb. 1937), and 22 A. B. A. J. 748 (Oct. 1936). See also Colonel McGuire's articles: "Proposed Reforms in Judicial Review of Federal Administrative Action," 19 A. B. A. J. 471 (Aug. 1933); "The Proposed United States Administrative Court," 22 A. B. A. J. 197 (March 1936); "Federal Administrative Action and Judicial Review," 22 A. B. A. J. 492 (July 1936); "Sailing Close to the Wind, or the Need for a Federal Administrative Court," 22 A. B. A. J. 853 (Dec. 1936).

70. The Comptroller General holds office for a 15-year term. U. S. C. A. Title 31, Sec. 43.

71. 295 U. S. 602 (1935).

72. See note 66, supra, pp. 227, 228.

73. Gambrell, "The Improvement of Administrative Law," 23 A. B. A. J. 94 (Feb. 1937).

to removal by the Senate for substantial specified causes after notice and hearing.[74] As to the remaining federal officers and all state administrative officers exercising judicial functions, it is believed that they should be appointed to serve at least for a fixed term of office of substantial duration, not less than six or seven years, and subject to removal only for substantial specified causes after notice and hearing. In this manner a greater degree of security of tenure for these important administrative officers would be provided, and there should be a substantial resulting improvement in the quality of their services and in the administration of justice.

VI.

Numerous plans have been proposed for the selection and tenure of judges.[75] None of them, of course, is perfect, and any proposal must be recognized as subject to further improvement under the recognized American method of experimentation, trial and error in the various states. It must also be recognized that in advocating a particular proposal we are treading upon highly debatable and controversial ground, as there are numerous proposed alternatives and much may be said for or against each plan. It is believed and respectfully submitted, however, that the plan hereinafter proposed, which is advocated by numerous authorities and students of the problem, would be an immeasurable improvement over the existing method, and offers the most acceptable substitute available.

Manifestly our proposed plan should be fundamentally based upon the principal of judicial selection through appointment rather than popular election of judges and should involve greater security of tenure. Appointment of the judges of appellate and trial courts of general jurisdiction should be made by the governor or highest executive officer of the state, who is elected by direct vote of the people as their chosen representative. There is thus obtained the advantage of centralized responsibility of the official who makes the actual appointment. The appointing agency should be, however, not single, but dual, in accordance with our traditional American principle of checks and balances, with proper safeguards to avoid so far as possible political appointments without due consideration of judicial fitness and qualifications.

It has been proposed by some eminent authorities that the appointive power should rest, not with the governor, but with the chief justice of the state's highest appellate court.[76] It is contended that appointments by the chief justice are less likely to be of a political nature, and that, being the highest judicial officer of the state, he has greater familiarity with the relative judicial capacity and qualifications of the candidates, and a stronger desire to appoint to the bench men who will elevate and honor the judiciary. Attention is called to England where appointments are made by the Lord Chancellor, and New Jersey where the vice chancellors are appointed by the chancellor.[77]

Much may be said in behalf of this proposal and theoretically it appears attractive. From a practical standpoint, however, it is believed that this plan would not prove desirable. The chief justices of our courts are already seriously overworked, without overloading them with this additional large task and serious responsibility. Moreover no judge should be placed in a position where he may be subject to pressure of a political nature and may incur animosities by reason of the exercise of such a power. The loss in the dignity, standing and prestige of chief justices and the appellate courts, if they are required to stand in the public view as the sole or principal appointing power, to whom must be presented the favorable and unfavorable aspects of each candidate's qualifications, would more than offset any advantages that might be derived from this method. Their advice would be valuable, but to give them the power of appointment would not prove satisfactory.

Since, therefore, the actual appointment should be made by the governor and the appointing agency should be dual, the next question is whether the check upon the appointment should be through subsequent confirmation by the legislature or a commission, or through prior selection of an eligible list of approximately three or four nominees for each vacancy by a judicial commission selected for that purpose, from which list the appointment must be made. It is believed that the eligible list method is preferable to subsequent confirmation, notwithstanding that in the federal judiciary and Massachusetts, as well as in England, the method of appointment to serve during good behavior with subsequent confirmation and without any previous eligible list has proved very satisfactory.

However, generally speaking, if appointments by the governor without an eligible list are to be confirmed by the legislature or state senate, there is serious danger that the selection of judges would still remain of a political nature. The members of the legislature are not elected for that purpose, and they are usually laymen having little knowledge of the subject of judicial qualifications, together with a smaller number of relatively inexperienced attorneys. Moreover the necessity for close cooperation between governor and lgislature in order to enact desired measures would probably too frequently result in either a meaningless rubber-stamp approval by the legislature or, on the other hand, political scheming, log-rolling and bargaining, and the dictation by the legislature to the governor of the demand for a political appointment of the legislature's choosing. In neither event would there be any very great improvement over the status quo.[78]

Much better, in our opinion, would be the selection of an eligible list of several nominees by a capable, experienced judicial commission, and appointment therefrom by the governor. In this manner there is centralized responsibility in the actual appointing power, and, so far as reasonably possible, danger of political appointments is removed. The check through

74. See note 66, supra, p. 228.

75. An excellent summary of these plans is given in the 1935 report of the Judicial Selection Committee of the Conference of Bar Association Delegates, pp. 15-22. See also, Haynes, "Selection, Tenure and Retirement of Judges," 7 Cal. St. Bar Jour. 120 (1932). A very good discussion of proposed plans by the Cincinnati Conference on the Selection and Tenure of Judges in Ohio, held in October, 1934, is given in 8 Univ. of Cincinnati L. Rev., pp. 359-532 (1934).

76. An able argument for this proposal will be found in Professor McCormick's two articles, "A Proposed Reorganization of the Illinois Judiciary," 29 Ill. Law Rev. 31 (1934), and "Judicial Selection—Current Plans and Trends," 30 Ill. Law Rev. 446 (1935). See also, Martin, "The Role of the Bar in Electing the Bench in Chicago" (1936), p. 353.

77. Hall, "The Selection, Tenure and Retirement of Judges," Bul. X, Am. Jud. Soc. (1915), p. 30.

78. Compare: Harley, 17 Jour. Am. Jud. Soc. 9 (June 1933); and McCormick, "Judicial Selection—Current Plans and Trends," 30 Ill. Law Rev. 446 (1935). See also, discussion of a glaring example of abuse of the method of appointment of supreme court judges by the legislature, in Rhode Island, on account of excessive political influence, in 21 A. B. A. J. 306 (1935).

subsequent confirmation is solely of a negative character. The consenting or confirming body can merely prevent a serious abuse of the appointing power. The natural disposition is to confirm an appointment previously made. The eligible list, on the other hand, by confining the appointment to those nominated by the judicial commission, limits executive power in an affirmative manner, although allowing the governor considerable latitude.[79]

There are numerous alternatives as to the personnel of the judicial commission. In our opinion it should be composed of the chief justice or other justice of the state's highest court and approximately five other prominent judges and attorneys, preferably from different geographical sections of the state, elected by vote of the state bar, and three prominent laymen, preferably residing in different parts of the state, appointed by the governor for that purpose. The commission would be large enough to be representative of the interests served, the bench, the bar, and the public, and yet small enough to be responsive to the demand of painstaking efficiency. In states having a judicial council, such duties might well be performed by the council.

Nominees of such a judicial commission, it is believed, would be men well qualified for judicial office and selected from that standpoint without regard to political influence. Such a small selected group of the more outstanding members of the bench and bar are more likely to make wise selections of judges than if nominations were made by vote of all of the members of the bar as a whole. Responsibility under such a plan would be too widely diffused; and it is undesirable that judges should be to such an extent under the influence of the bar.[80] Minority representation upon the commission by laymen would not detract from the caliber of judges selected, and at the same time would not only assist in gaining public support for the adoption of the necessary state constitutional amendment to make such change, but also would add to the public feeling of participation in the selection of judges and consequently would encourage greater public respect for the courts and greater public confidence in them.

In our view it is not particularly important whether as a third step confirmation of the appointment by the legislature or state senate is required. This would probably be advisable as an additional safeguard in states where the legislature is in session a considerable part of the time. In smaller states, however, where the legislature is in session for only two or three months each biennium, the additional advantages would not be sufficient to warrant the uncertainty and insecurity due to delay in obtaining confirmation or rejection.[81]

In our opinion the plan should also include an ingenious feature first proposed by Albert M. Kales in 1914.[82] It must be recognized that the public is not now ready to adopt a life tenure system as to state court judges. It is the general opinion that in order to eliminate the judge who, after taking office, becomes arbitrary, lazy, or otherwise deficient in judicial temperament or qualifications, there should be a method of removal other than the impracticable method of impeachment, after the judge has served during a reasonably lengthy trial period. Accordingly it is believed advisable that approximately six or eight years after taking office, and subsequently at intervals of approximately ten or twelve years, the incumbent judge should go before the people running upon his record, with no opposing candidate, the people voting upon the single question, "Shall Judge Blank be retained in office?"[83] In the event he is removed from office, the vacancy would be filled by appointment.

Coupled with this of course, should be the payment of adequate salaries to attract able men to the bench and suitable provisions for retirement of judges at full salary after reaching an appropriate age, such as seventy years. A judge should also be subject to removal at any time for cause, such as physical, mental, or moral unfitness or incapacity, after notice and hearing, by the state judicial commission.[84] In courts of many judges it would also be advisable to have a directing judicial head, with adequate supervisory powers, to exert a salutary influence upon the judges in the interest of greater efficiency.[85]

VII.

It is believed that this method will retain the best elements, both of the federal and of the elective systems, and largely eliminate the disadvantages of each. Undoubtedly the Kales feature of the incumbent judge running unopposed upon his record will increase public favor of the plan and facilitate the adoption of state constitutional amendments for this change in the judicial system,[86] which as shown by the experience of California in 1934, is at best a difficult task. The appointive principle is thus utilized in respect to the *selection* of judges, and the expression of the electorate is transferred from the function which it *cannot* properly perform, namely, the positive act of selection, to the function which it *can* perform, namely the negative act of voicing dissatisfaction, resulting in removal from office.[87] This plan retains the principle of popular control over the courts, but avoids the unquestioned evils of popular election. It applies the principle of the short ballot, and at the same time provides the necessary safeguards against judicial inefficiency and corruption.

By this method the judges are not too far removed from the people; a further check upon appointment is provided; it is entirely consonant with fundamental principles of American representative government; and through participation in the process the public should be expected to hold the courts in high respect and

(*Continued on page 986*)

79. Harley, 11 Jour. Am. Jud. Soc. 131 (Feb. 1928); Wood, "California's Crusade for Selection Reform," 19 Jour. Am. Jud. Soc. 52 (1935); Baker, "Selection and Tenure of Judges," 8 U. of Cincinnati Law Rev. 473 (1934).

80. Compare: Kales, "Methods of Selecting and Retiring Judges," 11 Jour. Am. Jud. Soc. 139 (1928); McCormick, "Judicial Selection—Current Plans and Trends," 30 Ill. Law Rev. 446, 451 (1935).

81. Baker, 8 Univ. of Cincinnati Law Rev. 483 (1934).

82. Kales, "Methods of Selecting and Retiring Judges," 11 Jour. Am. Jud. Soc. 133, 141 (1928); address delivered to Minnesota State Bar Assn. in 1914. See also McCormick, "Judicial Selection—Current Plans and Trends," 30 Ill. L. Rev. 446 (1935).

83. Compare: 1936 Report Judicial Selection Committee, Conference of Bar Association Delegates, p. 14.

84. This feature is included in the bill sponsored by the Washington State Bar Association, but which has not yet been enacted.

85. 1935 Report of Judicial Selection Committee, Conference of Bar Association Delegates, p. 26; Kales, "Methods of Selecting and Retiring Judges," 11 Jour. Am. Jud. Soc. 143 (1928); Shartel, "Retirement and Removal of Judges," 20 Jour. Am. Jud. Soc. 134 (Dec. 1936); Shartel, "Federal Judges—Appointment, Supervision and Removal," 15 Jour. Am. Jud. Soc. 46 (1931).

86. McCormick, "Judicial Selection—Current Plans and Trends," 30 Ill. L. Rev. 446 (1935).

87. McCormick, supra, note 76.

GIVING HUMAN INTEREST TO THE LAWYERS' MESSAGE: TWO SUCCESSFUL EXPERIMENTS

Mr. David Diamond Tells the House of Delegates at Kansas City Meeting about the Series of Dramatic Sketches Recently Put on the Radio by the Buffalo, N. Y., Bar Association and Illustrates It with a Radio Broadcast of One of Them by Local Station—St. Louis Bar Association Finds a Way to Interest the Public in the Problem of the Unlawful Practice of the Law and to Get Results—Mr. Case Tells about It

A GENTLEMAN looked hesitatingly through the door of the Hall in which the House of Delegates was holding one of its sessions at Kansas City. There came to him the sound of a radio broadcast in the best radio manner.

He looked startled, his eyes blinked, and he started to go. "I beg pardon," he said half apologetically to a man who was standing by the door, "I see I've made a mistake. I am looking for the Bar Association meeting —the House of Delegates."

"This is it," the man replied. The radio broadcast went on. It was a sort of domestic scene—mother, daughter, father, and something about a house and a lease.

The visitor braced himself. He was a temperate man. Could a mere appetizer in the form of a mild cocktail the night before have had such an effect on his nerves? He looked again, intently. The group certainly looked like a House of Delegates ought to look—if you left off the early matinee radio performance. It must be the House of Delegates—he recognized several members.

Then the broadcast came to an end, and the man standing at the door volunteered an explanation. This was simply a sample of a new way to attack the problem of public relations over the radio. The visitor should have heard Mr. Diamond's preliminary remarks, the man said.

But all this is anticipating somewhat. Let's get back to the beginning.

* * *

The importance of the public relations problem of the profession was well emphasized by Chairman Joseph D. Stecher, of the Junior Bar Conference, at the recent meeting at Kansas City. "The great issue, so far as the Bar is concerned," he said, "still remains. That issue involves the attitude and general opinion of the general public concerning the Bar.

"Our proper function to me seems clear," he continued, "—a program designed to improve the relations between the public and the Bar. That program must of course have some announced objective other than the mere restoration of public confidence. I can think of no subject more fitted to the need of the hour than 'The Improvement of the Administration of Justice.' It embraces the Supreme Court, our entire judicial system, and it embraces as well the important subjects of unauthorized and unethical practice of the law, subjects in which young lawyers should be intensely interested."

The problem is mainly one of method or rather of methods—for the Bar cannot afford to neglect any of the agencies for wide publicity. With the advent of the radio, a number of Associations were quick to see the importance of the new means of reaching the public, and, with the cooperation of the broadcasting companies and various local stations, many addresses have been made on subjects of general interest as to which members of the Bar might be held to have a peculiar competence to speak. As typical of these essays in the field of public relations the series of Constitution addresses recently broadcast by the Chicago Bar Association and the program sponsored for several years by the Kansas City Bar Association, under the direction of Mr. Orlin Weede's committee, may be mentioned.

It was natural that such radio broadcasts should at first take the form of addresses almost exclusively. But now comes a new and interesting variation of the radio program in the form of a series of dramatic sketches in which the useful part which the Bar plays in the ordinary affairs of life, as well as other messages which the profession naturally wishes the public to receive, is set forth in a form sufficiently unobtrusive to keep it from interfering with the main interest. The central idea, of course, is to lend human interest to the message.

The first experiment in this new method was told to the House of Delegates at Kansas City by Mr. David Diamond of the Buffalo Bar. To add to the interest and convincingness of his story, one of the sketches was broadcast by station KCMO at Kansas City and was heard by the House of Delegates at the conclusion of his introduction.

* * *

Another method of putting human interest into the activities of an Association, and thus of doing something to attract the attention which is necessary in dealing with the problem of public relations, was set forth by Mr. Clarence T. Case of the St. Louis Bar Association. In this instance, the desire of the Association was to strike at the unlawful practice of law in that city and to do it in a "human interest" way which would be sure to attract the public attention and drive the point home that the public is the chief sufferer from such practice. The newspapers, as Mr. Case states in his address, cooperated willingly and the results of the Association's effort were very satisfactory.

Following are the brief addresses of Mr. Diamond and Mr. Case.

Buffalo Bar Attacks Problem of Public Relations from a New Angle—Puts Significant Series of Dramatized Sketches on the Radio*

BY DAVID DIAMOND
Member of the Buffalo, N. Y., Bar

I HAVE exactly fifteen minutes in which to recount the experience of the Buffalo Bar in what we understand to be a new field. In exactly fifteen minutes we will present a transcription of one of the thirteen radio broadcasts out of the series which we put on last season. It will come into this hall from a Kansas City radio station. Before the broadcast starts, I will endeavor to give you its background.

Last year, under the leadership of Mr. Morey Bartholomew, the president of our County Bar Association, a committee of ten lawyers was created jointly with the Lawyers Club of Buffalo. This committee was headed by Mr. Evan Hollister, and one of its moving spirits was Mr. Philip J. Wickser, a member of the House of Delegates. One of the main duties of this committee was deemed to be the improvement of relations between the bar and the public. As a corollary, it was desired to mitigate the evils which have arisen as a result of the unlawful practice of the law on the part of laymen and lay agencies. We have a community composed of a great cosmopolitan population. We know of a great number of instances of social loss and personal loss which have been consequent upon the unlawful acts of notaries public, real estate men, and others.

Some of us had come to the conclusion that our profession was in dire need of a reappraisal of the entire public relations field. We felt that the conventional methods of approaching the public through such media as addresses by prominent lawyers had failed. And so we looked about for a new medium. We decided to utilize the radio.

Our decision was to abandon the old method. We announced a series of dramatic sketches. We employed a professional script writer and professional actors. Although it was possible to obtain radio time gratis as part of the required educational allotment, we decided to pay the regular rates for time. We are thus able to function without the restrictions attendant upon the use of free time.

In order to accomplish our purposes, we of course had to have finances. Our experience in this regard should, I think, be a source of inspiration to other bar associations similarly situated. We have a comparatively small bar. Notwithstanding this fact, our committee in a very short time obtained voluntary contributions from our members, outside of regular dues, in the sum of $15,000. We embarked on a two-year program, so as to have the necessary continuity of effort. The entire fund has by no means been used for radio purposes. The committee is expending moneys for other worth-while projects not pertinent to the subject of my remarks. Much of it is still on hand.

I was put in charge of our radio efforts. In commencing our task, we realized the obvious fact that we had a very delicate problem with which to deal. We had a very fine bit of balancing to do. We could not advertise, yet we had a definite message to put across to the public. We had to do it in a dignified fashion, yet it had to be done within the radio techniques available and in such a manner as to be understood by the intelligence of the listening public. Our sketches had to be entertaining, yet we had to point a moral to the tale.

It was also obvious to us that a great section of the public had certain feelings toward the bar which were too deep seated to be eradicated by any such device as radio dramas. We knew that it would take a great deal of effort to mitigate the unlawful practice evil. But we did believe and do believe that we could alleviate at least many of the symptoms by proper presentation of our point of view in a proper manner to the public. We got together twelve interesting fact situations, simple factually and intriguing dramatically. These situations were taken from actual cases, either in the books, or within our own experiences. We did not give any legal advice. That would be against the law in our state and against our wishes. We set about to furnish entertainment to the public and it took quite a bit of study to learn how to do this and at the same time drive home our points. Unfortunately, we did not have at our disposal such artists as John Barrymore or Helen Hayes. But we did try to get the best local talent available within our budget. Above all, we tried to make our presentations interesting.

A few of the titles to our radio dramas will indicate the kind of thing which are trying to accomplish. The one which you will hear in a few moments is called "Love is the Sweetest Thing." That doesn't sound much like a legal story but it was. It was an illustration of what happened to a man in modest means when he got tangled up in a lease into which he entered without advice. Another one was called "Repent at Leisure". This one had to do with false arrest. Another called "An Ounce of Prevention" recounted the results which flowed from taking title without examination. One script entitled "Legal Outlaws" touched a bit on ambulance chasing. Still another dealt with the overcrowded bar. We succeeded in weaving into this story some otherwise prosaic statistics. We also indicated where interested persons might go in our city to ascertain some pertinent facts about the study and practice of law.

The subject of adoption was dealt with in a script called "To Have and to Hold", while the matter of partnership was dramatically handled under the title of "Know your Partner". The very mysterious name of "The Unknown Affair" was given to a drama which indicated the role that a lawyer often plays in an amicable settlement out of court to bring about the elimination of matrimonial difficulties. "Ladies Unincorporated" had to do with a charitable institution which lost its substance because of the absence of good legal advice.

We had one presentation entitled "Free Speech" which we put over the air at the height of the Supreme

*Address delivered at the Fourth Session of the House of Delegates, at Kansas City.

Court controversy. We showed the part that the lawyer has played, regardless of remuneration, in the preservation of our liberties. We depicted the successful defense of a man who was arrested for saying things with which his counsel was in complete and hearty disagreement.

The point I am making is that we attracted attention to our program by using catchy titles, calculated to attract the interest of the average radio listener. Once they turned their dial to our station they did not hear stuffy speeches but heard the kind of drama which the radio public is accustomed to hear and for which there is apparently a great liking. Above all it was couched in language which everybody could understand.

Now I realize that we are operating in a new field. I know that to a large extent we are pioneering. Some of us are bound to feel hesitant about treading on this kind of new ground. We know that this sort of thing requires a great deal of experimentation. We can not and do not ever say "go see your lawyer". But we do try, as subtly as possible, to indicate, as we did in one of our sketches, the homely fact that when your steam pipes burst you don't send for your tailor. I think that our public is getting the point.

Of course, we have not come anywhere near the perfection in this medium at which we aim. But we do think that we have started along a new path which the bar generally might well investigate. I myself believe that our profession must radically overhaul its relations with the public in all possible fields, including the newspaper, the radio and, if you please, the motion picture. It seems to me that none of these great avenues of publicity has been at all utilized to our advantage and that with proper thought and proper investigation handled by the proper people a great amount of good can result to our profession.

Thus far our radio efforts have attracted considerable attention. The press has devoted quite a good deal of space to our series. Even Variety, that erudite trade paper of the theatrical profession, has devoted its columns to descriptions of our programs. We have copyrighted our skits and have made them available at nominal cost to bar associations interested. Associations all over the United States have indicated their interest.

In November we are commencing a new series of twenty-six broadcasts over a new radio station having a much wider coverage. In this connection I might mention the fact that I hope to make some transcriptions of our new program and make them available to the bar at large.

We are interested in exchanging ideas on this subject with other associations. We will be glad to furnish them with whatever ideas we have been able to develop. I appreciate very much having been asked to recount our experiences and hope that you all will enjoy "Love is the Sweetest Thing," which is now ready to come in over the air.

Favorable Local Publicity for the Suppression of Unauthorized Practice, and How to Secure It*

BY CLARENCE T. CASE
Member of the St. Louis, Mo., Bar

COMPETITION between the lawyers and laymen engaged in legal activities is an unequal battle. The conduct of professional men is circumscribed by rules of ethics. The general public never fully comprehends why these rules of professional propriety must be observed. People like to be lured by advertising and importuned by personal solicitation. They always admire the "go-getter." Because the lawyer stands aloof on his professional dignity, he is often looked upon as too painfully inert to be entrusted with matters of a professional or semi-professional nature.

This attitude furnishes the lay competitor a fertile field in which to stress a lack of practical ability in the legal profession, to impugn the integrity of lawyers generally, and to agitate some wild indignation as to excessive charges made by lawyers for their services. Widespread impressions of this kind have done much to undermine the legal profession with the laity. Add to this the insidious political propaganda against lawyers emanating from high places, and you have a condition where the legal profession must utilize all appropriate methods at its command to create public good will in its favor. In every community lawyers must be constantly alert to the necessity of so governing their actions as to call forth as much favorable publicity for their profession as is possible.

*Address delivered at a hearing of the Committee on Unlawful Practice of the Law at Kansas City, Mo.

Many of the direct attacks on non-members of the bar engaged in the unauthorized practice of the law have not resulted in favorable publicity. In some cases, the public has been led to believe that the Bar has gone out of its way to deprive someone of making what appears to be an honest living. In our haste to attain a certain objective, we may have overlooked the methods which would serve to clarify in the public mind that our actions are taken not so much for our own account as for the public benefit. Every action, therefore, against a lay practitioner should be planned beforehand to show justification from the laity standpoint, and should be publicised accordingly.

Perhaps some past experience of our own may not be out of place to serve as illustration. It was my privilege a few years to be chairman of a committee on the Unauthorized Practice of the Law. We began our labors by preparing a circular letter sent out to the lawyers setting forth our high purposes to serve the lawyers and to perform a necessary public duty. We invited our members to bring all grievances against laymen infringing upon legal practice to us. This letter furnished us the necessary opportunity to go to the press. Our published interviews informed the public that we were engaged in protecting their interest. The Bar Association received much favorable comment for the good work it was undertaking. People with real and imaginary complaints against various servitors applied to the Committee for relief. All this helped the

Committee to ascertain what lay agencies were actually at work on the border lines of legal practice.

At that time one of our leading daily newspapers was carrying in its Sunday editions the advertisements of a group of so-called life insurance adjusters on the same page where death notices regularly appeared. These advertisements were clever and unique. The names under which the schemers operated at least sounded pure and wholesome. They employed such titles as "Insurance Advisory Bureau," "Insurance Counsel and Advisory Bureau" and "Policy Holders Protective Bureau." Outstanding in each advertisement appeared the cheese in the mousetrap in the shape of those enticing words "Advice Free." Their notices called upon their prospects to bring in their insurance policies lapsed and otherwise. In each instance the obvious purpose was to get possession of the assured's policy.

Some of the more rash crusaders on our Committee were for immediately rushing into court with a series of actions on behalf of our outraged association against all these imposters, but instead we went into a huddle and decided to lie in wait for some overt act which we could capitalize with favorable publicity. Fortunately, we did not have to wait long. Just what we were looking for actually happened.

A victim of one of these racketeers appeared before the Committee. During her husband's last illness, she had delivered a $2,000.00 life policy into the hands of one of these free legal aid bureaus for the purpose of getting "free advice" as to the recovery of sick benefits under the insurance contract. She was amply assured that the Company would be vigorously pursued and made to pay such benefits while her husband was in the hospital. Thus comforted, the lady signed a 50% contract with the adjuster. Several weeks passed, but no sick benefits were received. Then one day, most likely to the adjuster's intense and savage joy, he found the poor husband's death notice in the newspaper. With commendable alacrity he procured the necessary death proofs, delivered them with the policy to the company and procured the $2,000 check payable to the widow. His next step was to take her to the bank where she endorsed the check, when he had cashed it he tendered her $1,000.00 and withheld $1,000.00 under his contract of employment. She refused to accept this division and came to us with her grievances.

As members of the Bar Association, without expense to her, we drafted and filed in behalf of the lady a civil suit for money had and received against the adjuster. That petition was drawn without serious regard to rules of pleading but with special design to publicize a complete expose of the methods and practices of this racketeer masquerading as a legal adviser. We sent copies to all newspapers where the story with its intense human interest captured front page space. The effect was instantaneous and electrical. In the enemy's camp it was an explosion. The daily newspaper immediately cancelled its space contracts with the entire group. Since they were deprived of the advertising which constituted their chief stock in trade, the whole dubious business suddenly stopped.

Thus with a simple civil suit a considerable number of unauthorized practitioners were driven from the field, and the medal of favorable publicity was bestowed on the Bar Association for distinguished service in action. The point of this experience is that the Bar does well to protest the just grievances of an injured public rather than its own.

In practically every case of unauthorized practice you are dealing with a layman of little or no scruples. At any rate, you know he has no respect for any such thing as professional ethics. Sooner or later, he is apt to be guilty of some sharp practice which would eternally condemn him as a dishonest man in the community. For instance, a collection agent may corral claims against a bankrupt, elect himself a Trustee, and in addition to his fees as trustee, may be guilty of collecting commissions from his clients on the dividends he pays out. The time to strike at such a man is when you know he is guilty, and the most effective way to strike is not by a proceeding brought direct by the Bar Association itself, but in a suit on behalf of the injured creditors through the Bar Association at its expense. Such an action immediately annihilates him, eliminates any repercussion against the Bar and furnishes a splendid opportunity for helpful publicity.

The title head of these remarks stresses not only "Favorable Local Publicity," but "How to Get It."

Just how to get it may have to be answered by each local committee in its own way. No one can write a complete formula which will apply at all times in all cases, but if any committee on the Unauthorized Practice of the Law is interested in a brief analysis, let me point out the following steps to be taken:

1. The first step of such a Committee is prepare an advance statement of just how it expects to serve the public and the Bar. This may be done by a circular letter addressed to the lawyers or by a report to the President of the local bar association. Such a statement should be especially designed for publication, and should include an invitation to the citizens to bring to the Committee their grievances against persons outside of the legal profession who may have attempted to serve them in legal matters.

2. The second step is to catalogue and classify all complaints filed, and select for action not only those which show usurpation of privilege by the unauthorized practitioner, but undeniable misconduct or imposition on his part against the laity.

3. Whenever possible get the injured party to permit you to bring suit in his behalf at your cost rather than have the Bar institute proceedings in its own name.

4. Finally the test of your success depends on whether the publicity you get is commendatory of the organized Bar for righteous conduct.

As officers of the Courts, especially licensed to practice, lawyers assume a certain duty to the public. Our citizenry has a right to expect that the legal profession will render service for the public good in consideration of the privileges it enjoys. True in most communities, lawyers do a full duty and are recognized as leaders in public affairs. The right to legitimate gain in their private practice is also well recognized. But when lawyers act collectively in association they must invariably regard the public interest involved. Committees on Unauthorized Practice of the Law should keep this constantly in mind, and be ever ready to secure the kind of publicity which will convince the public that the action taken is for its protection against the unscrupulous.

At the present moment the eyes of the nation are centered upon this enterprising city and the American Bar Meeting in this splendid coliseum. The success of this Convention depends not on how it all affects lawyers individually, but on what is developed here for the public good and how that benefit is publicised throughout the country. Individually, lawyers are engaged in private business, but collectively the Bar is a public institution. It should be universally understood among the laity that whatever is done by the organized Bar for its own good is bound to result in benefits for the general public.

THE LAWYER'S WIFE

ADDRESS AT ASSOCIATION LUNCHEON, ON OCT. 1 BY MR. E. K. WILLIAMS, K. C., OF WINNIPEG, CANADA, REPRESENTING THE CANADIAN BAR ASSOCIATION

IT is my great privilege today to bring to The American Bar Association from the President and Members of The Canadian Bar Association, our most cordial greetings and good wishes, and to thank your President and you, for the courtesy done us by his visit to us at Toronto this year.

It is no small thing that year after year we should thus lay emphasis upon what the late The Honourable George W. Wickersham, speaking in the Royal Courts of Justice in July, 1924, at the unveiling of the Statue of Sir William Blackstone, presented by your Association to the British Bar, so well described as:—

"The ties which bind us together as fellow-members of that profession upon which depends the maintenance of law and the continuance of justice."

And the individual members of our Association would, I am sure, wish me to convey to their individual personal friends, members of your Association, their affectionate personal regards.

I appreciate the honour, an honour which all our members covet, of having been chosen as our representative to attend your meeting, and it seems to me, at least, a happy coincidence that this year a resident of Winnipeg should so come to Kansas City, two cities whose history and development are very much the same. Within the same decade these cities, each originally a fur trading post, had their birth. The first white men who looked upon the Missouri and the Red River of the North were French explorers, and men of French birth played, and men of French descent have continued to play their magnificent parts in colonizing and building up the communities in which we live.

It will not be inappropriate, therefore, if I add in the other official language of the Dominion of Canada, the mother tongue of many of the members of The Canadian Bar Association, le beau parler de France, que je suis ici, comme délégué de notre association de vous exprimer notre amitié cordiale, et notre estime sincère pour votre Association et le Barreau distingué des Etats-Unis.

It is my intention, with your permission, to address most of the remarks I am privileged to make today, to the wives of the practising lawyers. In so doing I conceive that I shall be paying a small instalment on a debt owed to them by all Bar Associations.

For many years now you have graced our meetings by your presence and as a reward have been permitted to listen to learned papers and addresses on abstruse and technical subjects, which, however much appreciated by the Members of the Bar, cannot, I fear, have been a source of much inspiration or of unqualified delight to you.

In parenthesis may I say that I am not to be taken as speaking today to the ladies, married or single, who are members of the Bar. They are a people apart, and tempting as it would be to offer some observations to them, and, perhaps even more tempting to their husbands, that must be reserved for some other occasion.

I have no doubt that from time to time, at Bar Meetings, perhaps particularly at Bar Meetings, and in daily life you look at your husbands and wonder just what there is in the profession of the law that should produce the distinctive type, because it is a distinctive type, of man you have married.

May I make an attempt, I fear a feeble one, to explain the lawyer to the lawyer's wife—or at least to set out some of the influences which went to making of the man. And in the first place let me say that I do not think that every lawyer is a Lord Hatherley who, as Lord Westbury said, was a mere bundle of virtues with no redeeming vice. You know better than that, and I should be foolish indeed to attempt to deceive you.

The lawyers of the United States and of the common law Provinces of Canada, equally with the English barristers, trace their ancestry to the four great Inns of Court of England—Lincoln's Inn, Gray's Inn and the Inner and Middle Temples. And perhaps I can best illustrate to you the continuity of our great common traditions when I remind you that no less than five of the signers of the Declaration of Independence were barristers of the Middle Temple.

As you are aware, our profession emerges into history rather suddenly in the middle of the 14th century, at which time in a high state of organization the lawyers appear in possession of the four Inns of Court, two of which, the Inner and Middle Temple, are found in buildings formerly the property of the Knights Templar.

These lawyers appear to have adopted some of the customs of the Templars, their heraldic signs, their phraseology and even, it is suggested, some of their costumes.

The *fratres servientes*, serving brothers, of the Temple, in the old French *freres serjens*, gave their names to the *servientes ad legem*, the servants of the law represented for many centuries at the English Bar and still at the Irish Bar by the Serjeants at Law. Our old friend Serjeant Buzfuz of the Pickwick Papers is perhaps the best known of these gentlemen.

An account of the costumes of the lawyers might prove more interesting to the ladies present than anything else I could say, but I can only touch upon that subject, and that is really all I am qualified to do.

The black robes worn here by your Judges and by our Judges and Barristers are said to have been first worn on the occasion of the death of one of the Queens of England, the wife of William III, so that it is sometimes said the Bar is still in mourning for Queen Mary. But the English Judges and the Judges

of our Supreme Court of Canada do achieve a more colorful effect by wearing robes of scarlet and ermine.

These, however, are not nearly as gorgeous as the robes once worn by the Serjeant at Law—modelled probably after those of the Templars who seem to have loved the purple of Tyre with which they became familiar during the Crusades.

Referring to these robes Jekyll wrote:

"The serjeants are a grateful race
Their dress and language show it;
Their purple robes from Tyre we trace
Their arguments go to it."

You will no doubt have observed that we modern lawyers have carried on at least two of the old traditions. Our arguments are probably as tiring as those of the Serjeants ever were, but our brotherhood of the servants of the law is still a closely knit and joyous thing.

The life of the lawyer of those days appears to have centered entirely around the Inns. And they kept their various festivals, Grand Nights and Revels, high days and holidays in a manner no modern Bar Association can hope to equal.

Let me read you an account of one of the Revels in the Inner Temple in 1734 on the occasion of the elevation of Mr. Talbot to the Woolsack;—

"After an elegant dinner every member of each mess had a flask of claret besides the usual allowance of port and sack. The Benchers all assembled in the Great Hall and a large ring was formed around the fireplace, when the Master of the Revels, taking the Lord Chancellor by the right hand, he with his left took Mr. Justice Page, who joined to the other serjeants and benchers, danced about the coal fire according to the old ceremony, three times while the ancient song accompanied with music was sung by one Tony Aston dressed in a bar gown."

One of the best explanations I have read of the fellowship of the Bar was given by the late Lord Oxford and Asquith. When he as the Right Honourable H. H. Asquith became Prime Minister, the third Barrister to hold that office, the English Bar gave him a dinner and in the course of his reply to the addresses made to him he said:

"Here you are sitting around these tables in friendship and in brotherhood, united in doing honour to a member of our common profession to whom fortune has been kind. Why is that? The reason, to those of us who know the real spirit of the Bar, is plain, and it is this—the arduous struggle, the blows given and received. the exultation of victory, the sting of defeat, which are our daily experience, far from breeding division and ill-will, only bind us more closely together by the ties of a comradeship for which you would look in vain to any other arena of the ambitions and the rivalries of men."

And behind and beyond the struggles at the Bar and the relaxations of the Grand Nights down to this day, the lawyer has been playing no small part in improving the laws of the land and bettering the administration of Justice. At first it was the work of a comparatively small number of great men in stating and re-stating, studying, clarifying and codifying the law as it existed from time to time—Coke and Marshall, Kent and Blackstone, Story and Mansfield, and in our own days Holmes and Pollock, Holdsworth, Wigmore and Pound—to mention only a few. But as the years went on this great work was taken up by an ever increasing number of the Bar and in Institutes and Associations they are labouring with no thought of reward and no expectation of praise, for uniformity and simplicity in statement and in administration.

There were other traditions of the Templars, some of which have not been observed by us, while to others we have paid an involuntary obedience. The vow of the Templar was three-fold—poverty, celibacy and obedience.

The lawyer, all vulgar report to the contrary, has however unwillingly and in spite of himself, kept the vow of poverty. This is a statement that I am sure needs no demonstration to a lawyer's wife. Even of the most successful lawyer it is said that he works hard, lives well and dies poor.

I heard a distinguished American lawyer describe the profession as that of "Pride and Poverty." May it never become one of "Pride and Prejudice."

It will not be out of place to mention here that one of the heraldic signs of the Templars was a horse carrying two men, which, it is suggested, referred to a poverty so great that two knights had only one horse between them. This I may say was not the theme of the recent play "Three Men on a Horse." Another badge was the Holy Lamb. The Middle Temple appropriated the sign of the Lamb; the Inner Temple that of the Horse, which was transformed into a Pegasus, the winged horse. So that it was written:

"That clients may infer from thence
How just is our profession;
The Lamb sets forth our innocence,
The Horse our expedition."

It is sometimes a matter of regret that in our two newer countries it has been impossible because of such different conditions to have our Inns of Court, our Circuits with their messes, and all those things which add so much to the amenities of the lawyer's life in England. These things we must obtain in other ways. And our Bar Associations fill a great need in this respect. Further, our wives are perhaps better satisfied that our working lives should be spent in modern office buildings rather than in chambers which are not so modern, beautiful and historic though they may be. But I doubt whether even the least up to date chambers in London are like those described by Taylor—Editor of Punch, author of the play "Our American Cousin" and creator of the charactor of Lord Dundreary; when the buildings in which he had his chambers at Ten, Crown Office Row, were being demolished in the Sixties:

"They were fusty, they were musty, they were grimy dull and dim,
The paint scaled off the panelling, the stairs were all untrim—
The flooring creaked, the windows gaped, the doorposts stood awry,
The wind whipped round the corner with wild and wailing cry.
In a dingier set of chambers no man need wish to stow
Than those, old friend, wherein we denned, at Ten, Crown Office Row."

The vow of celibacy is one not usually made or kept by lawyers, and a glance around this room discloses many charming and convincing reasons why they neither could nor would ever consider keeping it. And in my humble judgment, it is well for the lawyer and the world that it should be so.

Then there is our vow of obedience. The strength

of the democratic nations and the salvation of the world today—and I use "democratic" in its broader and not —shall I say—in its Pickwickian sense—lies in the obedience to law, which it is the duty of the lawyer to inculcate, to demonstrate, and, what is more important, to justify to the rest of the community.

Of Obedience, Ruskin wrote:

"Obedience is, indeed, founded on a kind of freedom, else it would become mere subjugation, but that freedom is only granted that obedience may be more perfect, and thus while a measure of license is necessary to exhibit the individual energies of things, the fairness and pleasantness and perfecton of them all consist in their Restraint."

And the Prayer Books speak of the "service which is perfect freedom."

Furthermore, and I offer this observation with all the modesty of my profession and my sex, it is this habit of obedience that makes the lawyer the most desirable and satisfactory of husbands. I expect no dissent from this proposition from this gathering.

But, to forestall criticism, may I also read what the Rt. Honorable Augustine Birrell wrote in his Life of Sir Frank Lockwood:

"It might be unbecoming and even hazardous to assert that barristers make good husbands, but that they generally have good wives is, I think, the case. If this be the rule, Lockwood was no exception. He followed the example set him by all busy professional men who have sensible wives, and allotted to his spouse, as no more than her fair share of the matrimonial concern, all the trouble and anxieties of domestic life, leaving to her the task of making the necessary arrangements and attending to all the details in a spirit of the completest confidence. From the first hours of his married life Lockwood bade all anxieties, save those connected with his work and occasionally forebodings as to his health, an eternal farewell."

Such a group of men as I have attempted to describe must make an irresistible appeal to the maternal instinct.

Charles Lamb "the gentle Elia" in his Essay on "The Old Benchers of the Temple" wrote, "Lawyers, I suppose, were children once" and I think I am correctly remembering that when a memorial fountain and pool was built by the Bar in the Inner Temple Garden the inscription on it was an answer—"Even Lawyers were children once."

What then can you do to enable the lawyer you married, that child of a larger growth, to carry on the great traditions of his profession?

Kipling would from time to time write a poem which caused controversy and sometimes resentment. We think at once of certain lines of his "A woman is only a woman but a good cigar is a smoke"; "A rag and a bone and a hank of hair"; and others.

And he wrote another poem, for which he was verbally much be-laboured—"The Female of the Species." Seriously I think that poem one of the greatest compliments paid to the sex. You will remember he said:

"To serve that single issue lest the generation fail,
The female of the species must be deadlier than the male,
She who faces death by torture for each life beneath her breast
May not deal with doubts or pity—must not swerve for fact or jest,
These be purely male diversions—not in these her honour dwells,
She, that other law we live by, is that law and nothing else."

HON. E. K. WILLIAMS, K. C.
Who Represented the Canadian Bar Association

The generations are in your hands and your hearts; a very heavy responsibility, but a very noble trust; a responsibility that must be borne and a trust that must be fulfilled in that place from which most that is noble and enduring comes—the home.

It is not without significance that the abstract ideas of Liberty, Peace and Justice have always been represented by the figure of women. Just as your beautiful Liberty memorial stands here, Longfellow's Statue of Justice should stand aloft in every Public Square in our lands:

"Upholding the scales in its left hand,
And in its right a sword, as an emblem that justice presided
Over the laws of the land and the hearts and homes of the people."

Justice with her scales and sword was blindfolded to signify that she was impartial and took no heed of the class or condition of the suppliant. This was an old and a noble idea but are we perhaps not wiser in removing, as we are removing, the covering from her eyes and letting her look upon those who resort to her, with her clear and understanding woman's eyes?

One of the matters discussed at this meeting is "Professional Ethics and Grievances." We in Canada have similar problems. There are still in real life some of our brotherhood worthy to rank with Dodson and Fogg, Quirk Gammon and Snap, Sampson Brass and other disgraces to our profession.

But I believe that so long as each lawyer's wife, knowing the high standards of the profession by which we strive to govern ourselves, maintains, and lets him see that she maintains, her own pride in the fact that her own husband keeps the vision constantly before him, he will not consciously be unworthy of the trust.

Because it is true that woman is still upon the pedestal upon which her men have placed her and

from that pedestal, in spite of everything, her men will never lightly let her step down.

I do not mean that the lawyer's wife should be expected or even permitted to share in his professional problems or worries. The confidence between solicitor and client must always prevent that.

Like your distinguished President, I am a lover of Lewis Carroll, whom on occasion he quotes so appropriately. May I quote two verses of one of our favorite poems:

"'You are old,' said the youth, 'and your jaws are too weak
For anything tougher than suet;
Yet you finished the goose with the bones and the beak—
Pray how did you manage to do it?'

"'In my youth,' said his father, 'I took to the law,
And argued each case with my wife;
And the muscular strength, which it gave to my jaw,
Has lasted the rest of my life.'"

You will observe that the poet carefully refrains from saying what such arguments did to the jaw of Mrs. Father William. It is sad to think they probably had the same effect as they had on her husband. I am sure no member of our Associations wishes a wife with a jaw like that.

What we need is the inspiration of your confidence in us that we are living up to the highest ideals of a profession whose duty it is to administer laws, which require only of every man *honeste vivere*, to live honestly—*neminem laedere*, to harm no one—and *suum cuique tribuere*, to render unto everyone his due.

Do not think that we ask for any blind or unreasoning confidence. We do not expect, nor can we hope that you should have for us that sublime confidence in her husband possessed by Mrs. Gladstone, the wife of the Right Honourable W. E. Gladstone, one time Prime Minister of Great Britain.

The story is told that on one particular occasion when Mr. Gladstone was facing many serious national and international problems, he had been detained in the House on an evening when the Gladstones had invited guests to a dinner party. He arrived home after the guests had assembled and was hurriedly dressing for dinner. In the meantime the conversation in the drawing room was dealing largely with the troublous times through which the country was passing. One of the elderly women guests said to Mrs. Gladstone;—"Ah, it is a great consolation to think there is One above who is constantly watching over us," to which Mrs. Gladstone is said to have replied;—"Yes, it is too bad that he was detained in the House, but he will be down any moment now.'"

May I say one more thing. Do not feel slighted or neglected if your lawyer's devotion to the law appears to trench upon time which should be given to you or the family. That devotion is real devotion to you and for the benefit of his family and generation and generations yet to come.

Only by constant reading and study can a lawyer equip and what is even more important, keep himself equipped for the work he has to do. Lord Romilly once said that the unhappiest sight he had ever seen was an old lawyer who had ceased to read.

I have endeavoured to show that the lawyer has a happy but also a noble tradition, of which he is trying to be worthy to carry on the great work of those who have gone before him in the profession.

The sounds of war are today heard from all corners of the earth but war is merely one evidence of a greater struggle going on, the spiritual struggle between right and wrong, between Law and Chaos. In that struggle the lawyers of our countries must play important and perhaps vital parts.

It seems to me that there was much that was prophetic in the address of that great American and great citizen of the world, the late Honourable Elihu Root in presenting the report of the Committee of Organization of the American Law Institute in February of 1923. He said:—

"Gentlemen, many competent observers, many thoughtful students of history, are beginning to fear that the competency of mankind to govern is not keeping pace in its development with the ever-increasing complexity of life in this new era of universal inter-dependence. I have faith that our people will prove themselves equal to the ever-growing, ever-increasing demands upon them, of life, of these strange new years. I have faith: but they cannot do it by lying down. No free people, no democracy—and I include in this the American democracy—can maintain its institutions, its freedom, its justice, its opportunity for the future, unless there be general, practically universal effort, willingness to serve, desire for knowledge, determination to grapple with and deal with the difficult problems that confront humanity."

Those who have gone before have thrown to us the torch of Liberty within the Law, and it is our bounden duty and service to see that it shines with increased brilliance into the dark places of the earth, so that all peoples with thankfulness can acclaim what Senor Don Merry del Val so effectively described as "the triumph of the mind represented by the lawyer over force as the only foundation of government."

To Limit Federal Judges

A bill which would greatly limit the freedom and effectiveness of the Federal courts passed the House at the last session and was referred to the Senate Committee on the Judiciary. It still is in this Committee with no information available as to whether it is likely to be called up for consideration within the near future. It is H. R. 4721; and the House Judiciary Committee Report is No. 1027. According to the House Committee amendments, which made only slight changes in the title and the bill itself, it would read:

"A bill relative to granting and giving instructions in civil and criminal cases in the district courts of continental United States.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress, assembled,

"That upon the trial of any cause, civil or criminal, before a jury, in any district court of continental United States, or in any other Federal court of the continental United States authorized to try cases with the aid of a jury, the form, manner and time of giving and granting instructions to the jury shall be governed by the law and practice in the State courts of the State in which such trial may be had, and the judge shall make no comment upon the weight, sufficiency or credibility of the evidence or any part thereof, of upon the character, appearance, demeanor or credibility of any witness or party, unless such comment is authorized in trials of such cases by the law and practice in the State courts of the State where such trial is had."

SOME CURRENT PROBLEMS OF TAX ADMINISTRATION

Psychology of Reciprocal Confidence Would Help Insure Early Settlement of All but the Most Complicated Cases—More Decentralized Administration May Be Required for Expeditious Determination of Tax Liabilities—Treasury Considering Possibility of Declaratory Rulings on Prospective Transactions—Proper Adjustment of Tax Liabilities after Expiration of Period of Limitations—Mechanism Needed to Provide for Quicker Disposition of Thousands of Cases That Are Finally Settled without Hearing—Other Possible Improvements, etc.*

By Arthur H. Kent
Assistant General Counsel of Treasury Department

ADMINISTRATION constitutes one of the most vital and difficult aspects of Federal taxation. The variety and complexity of the taxes imposed, the far-flung organization that geography and population compel and the necessity of expedition and certainty in the determination of tax liabilities create difficulties of administration without end. The most numerous and important problems arise from the income tax, which, as the greatest single source of Federal revenue, requires the most elaborate machinery and brings the Treasury into direct contact with more individuals than any other tax. These problems will be emphasized in this discussion.

The extraordinary success of self-assessment, on which administration of the income tax is based, demonstrates that the rank and file of taxpayers endeavor fairly to discharge their duties as participants in the administration of the tax. The Government, however, cannot accept as final the taxpayer's analysis of the law as applied to his individual case. Because a small minority of dishonest taxpayers deliberately conceal pertinent information and because many honest taxpayers often and quite naturally miss the significance of relevant facts in the application of a complicated law to the facts of their individual cases, even though aided by accountants or attorneys, it is essential that returns be audited and investigated. The success of these audits and investigations depends for the most part upon the cooperation of the taxpayer. If he is reluctant to disclose the facts in his possession, the Government must reconstruct the true picture for itself. If its information is incomplete it must either forego additional assessments or assert claims not always well founded for it obviously cannot search out all of the evidence and prepare every case by the same methods available to taxpayers. A better understanding by the taxpayer as to what information is required of him, clearer instructions from the Bureau, more accurate deficiency letters, and a prompt and frank disclosure of the facts by the taxpayer should reduce considerably misunderstandings and the multiplication of investigations, conferences, and protracted litigation, with great saving to both the taxpayer and the Government. Otherwise the Government faces a delay which means loss of revenue through insolvency, dissipation of assets, creation of prior liens, etc.; and the taxpayer confronts at best a disturbance of settled business relations and at worst a paralysis of action until the applicable rule is determined. In the settlement of controversies too much disposition at present exists on both sides to delay and to get as far away as possible from the transactions giving rise to the question of tax liability. Yet controversies of fact might be best settled at a point as near as possible to the time and place where the facts in question occurred.

Many existing inequalities in administration could be eliminated if the separate judgments of the taxpayer and the administrative organization could be obtained and possibly harmonized within a reasonably short time after the due date of the tax; the Government could thus collect the revenues due and the taxpayer could conduct his affairs free from the contingencies of an uncertain liability.

A psychology of reciprocal confidence and a common desire to act fairly and expeditiously in arriving at the tax due would insure an early settlement of all but the most complicated cases.

There is great danger, as tax administration becomes an increasingly specialized function, that the ordinary citizen will regard himself as engaged in an uneven battle with a powerful bureaucracy. Such a situation breeds tax avoidance. In counteracting this attitude, the Treasury must make every effort to assure its own agents and the public of its desire to determine taxes promptly, fairly, and with a minimum of reviews and reversals. The dangers of bureaucratic routine in England are largely prevented by lay participation in the review of tax determinations. In the early stages responsibility for administration of the income tax rests upon the General Commissioners whose positions are honorary and independent of the Executive Government.

"Inland Revenue officials commend the services of these unpaid local commissioners in performing their statutory duties in relation to assessments and appeals . . . the taxpayer feels that they assure fair and impartial local administration of the tax."[1]

As the tax process becomes more complex, the dangers of bureaucracy in the later stages of assessment and collection are accompanied by the danger of unscrupulous practices in the earlier stage of self-assess-

*Address delivered before the Federal Tax Clinic at Kansas City, Mo., on Sept. 28, 1937.

1. Magill, Parker, and King, *A Summary of the British Tax System*, p. 7.

ment. Because the Government must rely chiefly upon tax returns it must guard against those practitioners in the legal and accounting professions who capitalize the complexities of taxes to embroil their clients and the Government in tax litigation. All reasonable measures must be taken to insure the Government as well as the taxpayers against practices which eventually react unfavorably on both parties.

The accomplishment of a more expeditious determination of tax liabilities may require a more decentralized administration, the assumption of more responsibility by the field force, and an incentive to taxpayers to settle their cases in the field. A workable scheme of decentralization that will retain the advantages of centralization and avoid its evils is not easy to find. The advantages of centralization lie in the fact that it can best insure uniformity in the application of the law to all taxpayers affected by the same principles of law and the same set of facts. The Washington office can draw from the entire service the men who have shown the keenest insight, the broadest view, and the best balanced judgment. It can train specialists on particular problems to a much greater extent than is possible in the field. Whatever may be done in the way of decentralization, the largest and most difficult cases will probably continue to gravitate to headquarters for settlement and the experience gained in dealing with such cases will give the Washington settlement men an advantage over the field men. Finally, the settlement staff, being larger than the field staffs, can afford its members greater opportunity for consultation with other men of ability and experience. Some way must be found to retain these advantages, to overcome the delays, expense, repeated reviews, and red tape which centralization entails, and at the same time to avoid the dangers in decentralization of local political influence and slavish devotion to routine. The problem is largely one of finding and retaining the personnel equal to such responsibilities. The Treasury is observing closely and studying with great care the experiment in decentralization begun some time ago in the Cleveland district and more recently in San Francisco and Dallas with the view to finding the most satisfactory combination of a decentralized administration with centralized supervision. Commissioner Halvering will discuss this experiment more fully later in the conference.

The Treasury is giving careful consideration to the possibility of issuing declaratory rulings on prospective transactions. Under the existing system the taxpayer is under the duty and risk of initial assessment without any certain guide in case of doubt except through the cost and delay of a law suit instituted after the tax is paid or by risking the payment of interest if he waits for his doubt to be resolved through the process of appealing deficiency assessments to the Board of Tax Appeals. With this responsibility of applying an intricate maze of law should go authoritative advice in case of doubt. Refusal under existing laws to give this advice is not due to an unawareness of the need for such guidance but, among other things, to the lack of authority to make rulings that are administratively binding. So long as the Commissioner is required to change rulings which he comes to believe or which the courts declare are erroneous, he will not risk the possibilities of error entailed by the unknown quantities of a future transaction or the injustice to taxpayers who change their position in reliance upon declaratory rulings. The principal impediment to the granting of statutory authority to make such rulings administratively binding is the risk of judicial disagreement and the discrimination it would involve if the correct rule were not applied uniformly. There is some hope of working out this problem, at least in those fields where the need is most urgent, and of insuring expedition and certainty in the determination of tax liabilities without sacrificing unduly uniformity in the application of the law to all taxpayers similarly situated.

Much deliberation has been given to proposals designed to prevent the inequitable results following a change of front by either the Government or the taxpayer after the expiration of the statutory periods of limitation. The general purpose of these proposals is to enable the Commissioner to make proper adjustment of tax liabilities in the numerous cases which for technical reasons are not subject to the rules of estoppel or recoupment. The problem arises in two broad classes of cases: The first and most difficult includes the cases in which taxpayers intentionally or unintentionally report items of income or deductions belonging in the returns of other related or associated taxpayers as in the case for example of (1) husband and wife, (2) fiduciaries and beneficiaries, (3) trusts (later held to be taxable as corporations) and beneficiaries or "stockholders," (4) changes in the distributive shares of members of partnerships, and (5) purported gifts of property determined to be in fact assignment of future income. The second class includes income or deductions either designedly or mistakenly included in a taxpayer's return for one taxable year and later held to be includible in the return for another year, as in the case for example of (1) the cash or accrued basis of reporting income, (2) the instalment basis of reporting income, (3) the proper year for the deduction of losses, probably the most troublesome of the categories under this classification, (4) determination of the year in which a sale or exchange of property was consummated, and (5) inventory adjustments over a period of two or more years. Too many controversies arise in both classes in which income escapes altogether or is taxed twice or where deductions are taken twice or not at all. There is general agreement as to the ill effects of the present system and the necessity of amending the statute of limitations to insure that in case of disputes as to the proper taxpayer or the proper year in which income or deductions should be reported, items should be taken into account once and only once. In the formulation of these provisions, consideration might well be given to the possibility of including, in addition to authority to make proper adjustment of liabilities after the expiration of the period of limitations in the classes of cases outlined, authority to the Commissioner to allow a deduction in a year in which taken or to deny a refund even though the facts ascertained later might indicate that the deduction should have been taken in some other year. Adherence to the taxable year as a unit should not be so rigid as to work inequities or to be productive of administrative inconvenience and hardship.

In May of this year a Joint Committee, representing the Board of Tax Appeals and the Chief Counsel's Office of the Bureau of Internal Revenue, was appointed to study the rules and procedure of the Board. This study has as its objective the recommendation of changes designed to expedite the disposition of cases pending before the Board. It was recognized by both the Board and the Treasury that the crowded docket of the former made such a study imperative. On July 1, 1937, there were pending before the Board 8,107 cases representing asserted gross deficiencies of $590,690,333.66. While on July 1, 1932, the number of cases

before the Board was 18,937, a difference of over 10,000, the amount of asserted deficiencies has varied but little, being 625 millions of dollars in 1932, and 590 millions in 1937. In the past three fiscal years a yearly average of over 4,000 new cases has been docketed with the Board. In the same period a little over 5,000 cases on an average have been closed by the Board. The great bulk of these, however, have been terminated by settlement, thus obviating hearing and decision by the Board. Thus, in the fiscal year 1936 there were 1,479 cases decided on the merits by the Board as compared to 3,416 cases settled. In 1937 there were only 939 decided cases, or 18.6 percent of the 5,043 cases closed during that period, as compared with 3,562 cases settled, a percentage figure of 70.6. It is readily apparent from these figures that the Board as a functioning organization is dependent entirely on the settlement processes that have been evolved in the Technical Staff and the Chief Counsel's Office. Without the yearly determination by these processes of 60 to 70 percent of its cases, the Board would be hoplessly deluged by the steady flood of petitions. But, although permitting the Board to keep above water, this dependence has brought unfortunate consequences. The difficulties inherent in devising an effective procedure for a docket containing indiscriminately a large number of cases which must be terminated by settlement and a smaller number requiring actual hearing and decision have up to the present prevented the Board from eliminating the existing backlog of cases and maintaining a current calendar. As it cannot be foreseen when the petitions are filed which cases will be settled and which tried, the bulk of these cases drag on for years, passing leisurely through the various stages in the procedure only to be abruptly settled a week or a day before the case is scheduled to be finally heard. This situation has developed primarily because at no point after the issuance of the deficiency letter is there any occasion for either side really to evaluate its case objectively until just prior to the hearing date, and human nature and legal tactics being what they are, the petitions are filed and the cases thereafter permitted to gather more dust and more legal documents until that date arrives. It would seem apparent that a mechanism must be devised whereby these 3,500 cases settled yearly may move to their termination along a speedier route and one separate from the legal path which must be followed by the cases that go to actual hearing. What that mechanism should be and how it will function is the problem that must be faced in any consideration of the procedure of the Board.

Once such a mechanism is established and the separation made, the next step is to improve the legal path to be taken by the cases to be heard by the Board. In the past few years rapid strides have been made in the field of civil procedure toward the goal of imparting to our legal institutions the efficiency of the modern world. A ready example is the Proposed Rules of Civil Procedure for the District Courts, prepared by the Advisory Committee appointed by the Supreme Court. Likewise, the changes in the State codes are familiar to all practitioners. But to date the Board has been unaffected by these developments and its rules are much the same as they were ten years ago. It would therefore seem profitable to reexamine these rules in the light of recent procedural experience and thereby bring to our tax machinery the benefit of that experience. This is the background for the present study that is being made of the rules and procedure of the Board.

Many of the defects in the administration of the Internal Revenue laws are attributable to the existing structure of judicial review of administrative determinations. In a system which provides 85 District Courts, 10 Circuit Courts of Appeals, the Court of Appeals for the District of Columbia, the Court of Claims, and the Board of Tax Appeals (a total of 250 judges and members) to review tax assessments, delay, uncertainty and discrimination are inevitable. Finality comes only with a decision of the Supreme Court, but it usually takes years to obtain such a decision. Cases must proceed through the Court of Claims, or through the District Courts or the Board of Tax Appeals to the Circuit Courts of Appeals. Decisions of the Circuit Courts of Appeals are rarely reviewed by the Supreme Court in the absence of a conflict among the circuits, but they by no means settle issues. If the taxpayer is the defeated party, other taxpayers in different circuits will still litigate the same question. If the Government is the defeated party, it cannot afford to abide by that decision but must litigate the issue in the other circuits in the hope of developing a conflict which will then cause the Supreme Court to pronounce its judgment. To act otherwise is to endanger the collection of the revenue, since experience has shown that conflicts in judicial decision abound in this field. Another taxpayer, to serve his interests and because of the vagaries of tax law, may years later urge in another Circuit the very contention that the Government unsuccessfully advanced in the first case. If this taxpayer eventually wins in the Supreme Court, thus indicating that the Government was legally correct in the first case and surrendered too soon, millions of dollars in revenue may have been lost in the interval. If all the taxpayers in the other circuits agree with the Government's position, as not infrequently happens, there will never be a conflict and the anomalous situation will exist in which the law will be administered one way in one circuit and in an entirely different way in every other circuit. Where there are no circuit court decisions the Commissioner must determine what the law is. On doubtful questions it is frequently essential to take inconsistent positions on the same question whichever will favor the revenues. This practice under existing conditions cannot be avoided since taxpayers in the several circuits are free to take both sides and be inconsistent with one another.

The inevitable differences of opinion occasioned by the number of judges who pass on tax questions combined with a procedure that impedes the resolution of these differences, obstruct expeditious and uniform administration of the Internal Revenue laws. Effective tax administration must wait upon a process of judicial review which will avoid frequent judicial disagreement and afford a speedy final answer to controversial issues.

In the meantime much can be done to expedite the accomplishment of this objective if improvements upon which there is general agreement can be adopted without delay. A notable instance is found in the present system for the recovery by suit of overpayments of internal revenue taxes. There is no longer any justification for continuing the present hodge-podge of suits against collectors, against the United States in the District Courts, and against the United States in the Court of Claims. Although the suit against the collector once had an appropriate place among the taxpayer's remedies, it is now an anachronism described by the Supreme Court as "an anomalous relic of

(*Continued on page* 987)

AMERICAN BAR ASSOCIATION JOVRNAL

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ASSOCIATION MEMBERS HAVE VOTED THEIR VIEWS

During the month of November, ballot envelopes came to Association Headquarters in impressive quantities, as members of the Association in every State availed themselves of the opportunity to express with votes their views upon various proposals for constitutional Amendments and legislation as to the employment of children in industry. The polls closed on December first; and this issue of *The Journal* has been held, to permit the prompt publication of the results of the referendum as tabulated and announced by the Board of Elections.

This was the Association's first experiment in conducting a referendum on questions which, although of public importance and general interest, are not at the time uppermost in the public mind. The absence of ascendant and acute public controversy on the particular subjects led fewer members to take part, as compared with the great number who so eagerly voted their views on the Court issues last March. On the other hand, the substantial vote polled may be taken as representing a dispassionate and deliberative judgment on the part of those who were interested in expressing their views on some or all of the five questions submitted, and so sent in their ballots. A conclusion which many members will draw from the experience gained in this referendum is that use of the referendum procedure provided in the Constitution of the Association will wisely be confined to major questions of Association attitude and policy on which there is at the time a general and active public interest. As to other questions, the decisions may acceptably be made by the representative House of Delegates.

Because of its history, the subject of the Association's attitude upon Amendments and legislation as to child labor was appropriately submitted to referendum. The Association has been unfairly but severely criticized for its opposition to the Amendment proposed to the States in 1924; the claim has been widely made that this opposition was not in accord with the views of the interested members of the Association. Beyond a doubt, this referendum has accomplished the prime purpose for which it was authorized, in that every member of the Association has had an opportunity to express by his vote his own views upon various phases of the child labor issues, so that hereafter the Association's stand on the present aspects of the subject will be that democratically determined by its interested membership, rather than by the relatively small number who can and do come to annual meetings.

The results of the referendum clarify the Association's stand and speak for themselves. By a vote of nearly four to one, opposition to ratification of the 1924 Amendment was affirmed. This leaves no room for a renewal of the charge that the opposition maintained during the past five years has not been in accord with the views prevailing among the interested membership. On the other hand, by the vote on Question One, the referendum sustained the reiterated declarations of the Association's Special Committee and the House of Delegates that the Association "is not now and never has been opposed to an appropriate Amendment or appropriate legislation limiting or prohibiting the employment of children for hire." By a definite margin, the vote favored *an* Amendment to the Constitution on this subject, although there was a strong minority whose votes expressed concern as to further impairment of the historic boundaries between State and National powers. By a vote of over six to one, the participating members expressed preference for the Vandenberg Amendment unanimously reported by the Senate Committee on the Judiciary, as compared with the unratified Amendment submitted to the States in 1924.

The unfounded charge that the Association has been content merely to oppose the 1924 Amendment was answered by a pronounced margin of votes in favor of the submission and ratification of the Vandenberg Amendment. On the other hand, the discriminating vote in opposition to the enactment of substantially the Wheeler-Johnson bill in its

present form revealed both that many members had examined its provisions critically and had concluded that the bill as drafted contains unsuitable provisions or does not in its present form represent the best available method of supplementing and implementing State legislation, and also that many members are of the opinion that an Amendment is so essential to fair and well-considered legislation on the subject that until such a grant of powers is given to the Congress, no proper and adequate statute can be drawn within existing limitations.

Upon each of the five questions submitted, there was a substantial minority vote polled. However, "the battle of the ballots" renders majority decisions; and under Article V, Section 10, of the Constitution of the Association, the results of the referendum constitute the instructions and the mandate of the Special Committee on Amendments and Legislation as to Child Labor. Every member of the Association remains free to hold and speak his own views, and is in no way bound, precluded or proscribed individually by the outcome of the vote. Even those who disagree with the views prevailing on some or all of the five questions will recognize that the majority has spoken.

There is something which stirs emotions, in the sight of many thousands of ballots coming from lawyers in their own offices, in every part of the United States. The democratic nature of such a process of Association decision is intriguing; to try to visualize the offices and the men from whom these ballots come—from little towns and large cities—South, North, East and West—quickens the imagination. With many of the ballot envelopes have come letters, in which members have stated earnestly their strong convictions and their great concern for the country—letters which confirm that lawyers think deeply on public questions, are stirred by an intense love of country, and are glad to have their Association give them an opportunity to *write to some one* the views which move them so profoundly, in these troubled times. Pent-up views have been put to paper, in a hope that they will somehow reach some one who can give voice and weight to them.

Such a referendum is a revelation of a great reservoir of sturdy and patriotic opinion—the views of men who know and serve their communities, who see at first hand the needs of people, who are deeply concerned as to the conditions under which their children and their children's children will live and work, and who commonly have the detached and reflective habits of mind which permit trustworthy vision. To bring to the aid of the consideration of constitutional questions a Nation-wide consensus of the deliberate opinion of many thousands of such citizens, is a contribution which the American Bar Association is highly privileged to make.

PRACTICAL COOPERATION BETWEEN THE PRESS AND BAR

A heartening revelation of the reasoned progress which can be secured through open-minded conference, is afforded by the report to the Kansas City meeting by the Association's Special Committee on Cooperation Between Press, Radio and Bar. Early in 1936, committees were appointed by the American Newspaper Publisher's Association, the American Society of Newspaper Editors, and the American Bar Association, to see what could practicably be done to curb the evils of excessive "publicity" attending and affecting the conduct of judicial and quasi-judicial proceedings. Distinguished publishers and editors, identified with the success of great newspaper properties, met in conferences with representative lawyers, under the joint Chairmanship of Mr. Newton D. Baker, member of the Board of Governors of the American Bar Association.

Members of the Association will do well to turn back to their Advance Program pamphlet (pages 229-244), to read the simple chronicle of the way in which this Joint Committee proceeded to survey its field, develop its problems, find its points of agreement, and narrow the points of difference. The report may well furnish a model procedure for all who are called upon to undertake similar tasks; its clear statement of the background of its troublesome problems should be read by every judge and by every lawyer.

As was to be expected, the Joint Committee did not secure, during its first year, complete agreement among the three groups upon practicable steps for ending all of the abuses which were found to exist. A gratifying, almost surprising, amount of progress was made; and the representatives of the American Bar Association sensibly asked that the House of Delegates approve this year only so much of the work of the Joint Committee as had been agreed on by the three groups, and that the Committee be continued for the purpose of seeing if agreement on the remaining aspects cannot be brought about.

In its grasp of the fundamentals of fair and impartial trials and of the dangers inherent in extraneous influences, the Joint Commit-

tee showed itself to be sure-footed. "The Committee is unanimous," its report said, "in believing that the highest interests of society require a system of judicial administration which, without fear or favor, will protect the rights both of society and of persons accused of breaching its peace. We are likewise unanimous in believing that all extraneous influences which tend, or may tend, to create favor, prejudice, or passion should be eliminated."

Upon many matters pertaining to the conduct of lawyers and judges as to the publicizing of judicial proceedings, the Joint Committee is unanimous in its conclusions and clear and specific in its recommendations. The need for better methods of selecting judges, in order to free them from political influences, is apparent from the report. As to Canon 20 of the Canons of Professional Ethics—"Newspaper Discussion of Pending Litigation"—which is often violated by members of the Bar in high place, even as to cases *sub judice,* the report says that "The Committee is clear that if local bar associations would resolutely enforce the obvious and known requirements of the code of professional ethics upon the lawyers who are subject to the disciplinary actions of the Bar, a very substantial part of the most glaring evils of improper publicity would be overcome." The Joint Committee is unanimous in various recommendations designed to prevent recurrence of such flagrant incidents as have aroused controversy as to conspicuous trials. The House of Delegates adopted amendments of the Canons of Judicial Ethics, to give effect to these recommendations.

The Joint Committee is unanimous in recommending "that the use of cameras in courtrooms should be only with the knowledge and approval of the trial judge." The representatives of the American Bar Association recommend that in criminal cases the consent of counsel for the accused, and in civil cases the consent of counsel for both sides, should be required to be secured. The newspaper representatives on the Joint Committee feel that the consent of the trial judge is full protection to parties and witnesses, and that no further requirement should be interposed. The respective views are ably stated, without heat; disagreement upon this vital point remains for further consideration, along with the question of limitations to be observed by newspapers and other publicity agencies in their accounts of occurrences in judicial proceedings.

The Joint Committee believes that "there should be a continuing effort, local in character, to regulate the relations under discussion," and recommends "that local Bar Associations appoint continuing committees on press relations to function with corresponding commmittees representing the Press and other means of publicity. So far as the legal members of such committees are concerned, they should be carefully chosen from among the more thoughtful members of the Bar and they should be men of such professional dignity that responsible editors would be willing to discuss with them, currently and frankly, the difficulties presented by any particular trial during its progress." This important recommendation by the publishers, the editors, and the American Bar Association representatives, was given the unanimous backing of the House of Delegates in Kansas City.

The progress that has been made by this notable joint venture in a difficult field is most encouraging. The demonstration that leaders of the newspaper profession and of the profession of law are in substantial accord upon the essentials of fair trial of judicial and quasi-judicial proceedings is timely and reassuring. The unanimous agreement upon a clear statement of the applicable and basic principles is in itself a major public service, the importance of which may be increasingly realized.

AN AWARD OF HIGH HONOR

Those severe critics who arraign lawyers and Bar Associations in the newspapers and popular magazines seize upon instances of individual dereliction and fail to give credit for the diligent public service which groups of lawyers are constantly but inconspicuously rendering, under the auspices of the Bar Associations, local, State and National. The constructive work of the organized Bar is never presented in these caustic indictments; the effective work done in "policing" the profession and driving out the offenders against justice is rarely recognized. Under such circumstances, the American Bar Association wisely takes the lead in according the recognition and praise of the profession, for these noteworthy and public-spirited achievements.

At the 1937 meeting of the Association, the Morris B. Mitchell award to the local Bar Association which makes the best report "on the activity most beneficial to the Bar and the public," was bestowed on The Association of the Bar of the City of New York. The winning report was prepared by its Secretary, Charles H. Strong, its Delegate in the House of Delegates. The report described the drastic and effectual steps taken, under the auspices of the Association, to reduce "ambulance-chasing" in the City of New York. With some help from

the New York County Lawyers' Association, the Association of the Bar supplied forty-five lawyers to assist in the investigation, all on a volunteer basis, for periods ranging from two to four months—no "head-lines" will ever herald this service "in the front-line trenches" of the war against practices harmful to the public and the profession. As a result of this work, eighty-three convictions were secured, nine of them being members of the Bar; ten other lawyers resigned from practice; the cases of seventy-four members of the Bar were referred to the Grievance Committee of the Association for consideration; and fraudulent, collusive personal injury cases largely disappeared from the overburdened calendars of the Courts. Mr. Strong's report tells also of the Association's strong condemnation of such an unethical practice as that of an attorney engaging his services to known criminals or persons engaged in criminal activities upon an understanding that he will represent them in the Courts when trouble results. Charges of this character were preferred by the Association against an attorney, and the respondent has recently been disbarred by the Appellate Division of the New York Supreme Court, after a long trial prosecuted by the Association. Mr. Strong's report is published elsewhere in this issue.

In practically every State, instances of like public service by a local or regional Bar Association are frequent. The lawyers who give their days and nights, their hours of leisure and diversion, unselfishly to these tasks, rarely receive any meed of praise. The caustic attacks on the profession continue, in utter disregard of what is actually done by the organized Bar. With its long history of honorable and distinctive service in many good causes, the Association of the Bar has received at this time a merited award; but the event should be taken as token of the fact that the recipient Association, and many other Associations throughout the country, are *continuously* engaged in many projects which protect and benefit the whole public. In myriad ways, through the informing of public opinion, the supplying of expert assistance in the drafting and scrutiny of legislation, the giving of disinterested counsel as to men and measures, and the performance of the hard, thankless tasks of "policing" the profession and proving the guilt of offenders, such a Bar Association is an institution of public importance. It could not control the votes of its own members if it tried to do so; it could not dictate public opinion on any subject; its effectiveness must always fall short of the merit of its activities; but its work goes on with unremitting zeal. It is unfortunate that such a factual survey as M. Louise Rutherford has made as to "The Influence of the American Bar Association upon Public Opinion and Legislation" has not yet been made as to the work of local, regional and State Bar Associations.

IMPROVING THE ORGANIZATION OF THE BAR WITHIN THE STATES

There are many indications that the Kansas City meeting made dramatic the growing interest in the work of the American Bar Association. Many lawyers had sincerely doubted whether a democratic and truly representative organization of the Bar could function effectively and manifest wise, forceful leadership. Any such doubts have been cleared away by the impressive record of the Kansas City sessions.

The time may be opportune for efforts to improve further the structure and broaden the membership of Bar organizations within the States. After all, the vitality and success of of the House of Delegates will depend ultimately upon the vitality and the representative character of the Bar organizations which are federated in the House. The experience in the American Bar Association has shown that the effectiveness of such an organization is enhanced, not sacrificed, by broadening the participation of its members in the conduct of its affairs and the decision of its policies. It is the pathway to steady increase in membership and to greater authority in matters pertaining to the administration of justice. More than thirty thousand lawyers in the American Bar Association are becoming accustomed to a form of Bar organization in which they have the controlling voice and vote. They like it, and are not likely to be satisfied long with anything less. Hardly anyone would wish State or local Bar Associations in any State to remain less representative or less responsive to the ascertained wishes of the profession. Whatever doubts and fears may have held back an open-minded re-examination and re-appraisal of existing structures of Bar organization in any State or locality have happily been dispelled. Practical steps for more representative and inclusive organization will be easy to take, whenever and wherever lawyers say definitely and emphatically that they wish them taken. Representation of local and regional Bar Associations in the governing body of the State Association is likely to be among the important steps forward.

REVIEW OF RECENT SUPREME COURT DECISIONS

Regulations of State of Washington Governing Inspection of Motor Driven Vessels on Navigable Waters Upheld—Virginia Entrance Fee Charged Foreign Corporations for Privilege of Doing Intrastate Business Held Valid—Taxable Dividends under Revenue Act of 1928—Certain "Tax-Exempt" Iowa Bonds Held Liable to State Personal Net Income Tax—Refund of Federal Income Tax Overpayment Allowable though Deficiency Exists in Tax for Prior Year Barred by Limitation—Taxable Status of Payments as Gifts or Compensation under Federal Income Tax—State Corporation Dissolved under State Law without Power to Reorganize under Section 77B—Summaries of Other Cases

By Edgar Bronson Tolman*

Maritime Law—Regulations as to Safety—State and Federal Laws

State regulations governing the inspection of hull and machinery of motor driven vessels on navigable waters are valid, where no federal regulations have been made governing such matters and they are not such as require uniformity of regulation.

Kelly et al. vs. State of Washington ex rel. Foss Co., Inc., 82 Adv. Op. 39; 58 Sup. Ct. Rep. 87.

In this opinion the Supreme Court considered the scope of operation of federal statutes concerning motor-driven tugs in their relation to state laws on the same subject. The respondents own 139 motor-driven tugs of which 111 are less than 65 feet in length. They sought a writ of prohibition in the State Court to prevent enforcement of Chapter 200 of the Laws of Washington of 1907 relating to the inspection and operation of vessels. The Supreme Court of the State granted the relief sought, holding that the statute was invalid if applied to the navigable waters over which the Federal Government has control. On certiorari, this judgment was reversed in an opinion by the Chief Justice.

The first question considered was the question whether the state legislation as applied is in all respects in conflict with the express provisions of federal laws and regulations. It was pointed out that the State Court described the state statute as a comprehensive and complete code for the inspection and regulation of every vessel operated by machinery which is not subject to inspection under the laws of the United States. The opinion then reviews in considerable detail the provisions of the federal statutes and regulations dealing with vessels on navigable waters of the United States. Those relating to steam vessels are found to be extremely detailed, while those concerning motor-driven vessels are much less comprehensive and establish only a limited regulation.

It was noted however that the limited application of the federal laws to vessels equipped with internal combustion engines was recently brought to the attention of Congress, and that Congress concluded to widen its regulation of motor-driven vessels only to vessels specified in the Act of June 20, 1936. A review of the federal statutes and regulations led to the conclusion that they did not provide for the inspection of the hull and machinery of the respondent's motor-driven tugs to insure safety or determine seaworthiness. This conclusion was stated in the following language of the Court:

"We find the conclusion inescapable that, apart from the particular requirements in other respects, there is no provision of the federal laws and regulations for the inspection of the hull and machinery of respondent's motor-driven tugs in order to insure safety or determine seaworthiness, where these tugs respectively do not carry freight or passengers for hire, or do not have on board any inflammable or combustible liquid cargo in bulk, or do not transport explosives or like dangerous cargo, or are not seagoing vessels of three hundred gross tons or over, or, with respect to requirements as to load lines, are under one hundred and fifty gross tons. It follows that inspection of the hull and machinery of these tugs by state authorities in order to insure safety and determine seaworthiness is not in conflict with any express provision of the federal laws and regulations. The testimony in the record shows that those laws and regulations are administered in accordance with this view."

Next considered was the question whether the federal statutes by implication prohibit inspection by state authorities of the hull and machinery of vessels which in this respect are not subject to the federal regulations. The State Court took the view that Congress had occupied the field to the exclusion of state action. While recognizing that such a conclusion would be proper either in the case of a direct conflict between state and federal laws, or in the case where the subject is one demanding uniformity of regulation, such a view was declared inadmissible here. The general validity of state action when there is no conflict with federal law and where there is no necessity for uniformity, was described by the learned Chief Justice in the following language:

"Under our constitutional system, there necessarily remains to the States, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. . . States are thus enabled to deal with local exigencies and to exert in the absence of conflict with federal legislation an essential protective power. And when Congress does exercise its paramount authority, it is obvious that Congress may determine how far its regulation shall go. There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced. The principle is thoroughly established that the exercise by the

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State of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.' . . ."

Several cases were then cited illustrative of situations in which state action is valid, because harmonious with the operation of federal laws. The operation of the state regulations here, consistently with the federal regulations, was approved with the following comment:

"In the instant case, in relation to the inspection of the hull and machinery of respondents' tugs, the state law touches that which the federal laws and regulations have left untouched. There is plainly no inconsistency with the federal provisions. It would hardly be asserted that when Congress set up its elaborate regulations as to steam vessels, it deprived the State of the exercise of its protective power as to vessels not propelled by steam. The fact that the federal regulations were numerous and elaborate does not extend them beyond the boundary they established. When Congress took up the regulation of vessels otherwise propelled it applied its requirements to vessels of a described tonnage which carried freight or passengers for hire. When Congress a few years later passed the Motor-Boat Act, it did not attempt to deal with the subject comprehensively but laid down rules in a few particulars of a definitely restricted range. And when, in 1936, Congress again addressed itself to the subject, it did not purport to occupy the entire field but confined its regulation to seagoing vessels of three hundred gross tons and over. It would be difficult to find a series of statutes in which the intention of Congress to circumscribe its regulation and to occupy a field limited by definite description is more clearly manifested.

"When the State is seeking to prevent the operation of unsafe and unseaworthy vessels in going to and from its ports, it is exercising a protective power akin to that which enables the State to exclude diseased persons, animals and plants. These are not proper subjects of commerce and an unsafe and unseaworthy vessel is not a proper instrumentality of commerce. When the State is seeking to protect a vital interest, we have always been slow to find that the inaction of Congress has shorn the State of the power which it would otherwise possess. And we are unable to conclude that so far as concerns the inspection of the hull and machinery of these vessels of respondents in order to insure safety and seaworthiness, the federal laws and regulations, which as we have found are not expressly applicable, carry any implied prohibition of state action."

In conclusion attention was given to the question whether the state law must fall in its entirety, not because of inconsistency with federal law, but because the subject is one requiring uniformity of regulation so that the state is without authority, irrespective of Congressional action. While recognizing that there might be provinces in which uniformity is required, the Court found that the regulations relating to the inspection of hull and machinery do not relate to a subject requiring uniformity. As to this the Court said:

"We have found that in relation to the inspection of the hull and machinery of these tugs, in order to insure safety and seaworthiness, there is a field in which the state law could operate without coming into conflict with present federal laws. Is that a subject which necessarily and in all aspects requires uniformity of regulation and as to which the State cannot act at all, although Congress has not acted? We hold that it is not. A vessel which is actually unsafe and unseaworthy in the primary and commonly understood sense is not within the protection of that principle. The State may treat it as it may treat a diseased animal or unwholesome food. In such a matter, the State may protect its people without waiting for federal action providing the state action does not come into conflict with federal rules. If, however, the State goes further and attempts to impose particular standards as to structure, design, equipment and operation which in the judgment of its authorities may be desirable but pass beyond what is plainly essential to safety and seaworthiness, the State will encounter the principle that such requirements, if imposed at all, must be through the action of Congress which can establish a uniform rule. Whether the State in a particular matter goes too far must be left to be determined when the precise question arises."

Foreign Corporations—Privilege Tax

A state may lawully require payment of an entrance fee by foreign corporations (graduated in amount and dependent on the authorized capital stock of the corporation) as a condition to the grant of a certificate to do intrastate business within the State. Such an exaction, being a privilege fee, does not impose an undue burden on interstate commerce, or constitute a violation of the due process or equal protection clause of the Fourteenth Amendment.

The Atlantic Refining Company vs. Commonwealth of Virginia, 82 Adv. Op. 52; 58 Sup. Ct. Rep. 75.

This opinion dealt with the validity of an entrance fee imposed on the appellant for the privilege of doing local business as a foreign corporation in Virginia. That State imposes entrance fees on foreign corporations, which vary in amount, depending upon which of twelve classes the corporation belongs to. The classes are based upon the authorized capital stock of corporations affected by the fee. The fee for the lowest class is $30.00 covering corporations whose authorized capital stock is $50,000 or less, while the fee for the highest class is $5,000 covering corporations whose authorized capital stock is $90,000,000 or more. The appellant had for some years prior to 1930 done interstate business in Virginia. In that year it applied for a certificate of authority to do local business within the State. At that time its net assets were approximately $132,000,000, authorized capital $100,000,000, and its issued capital approximately $67,000,000. The Commission granted the certificate, but imposed a $5,000 entrance fee, as required by statute. Payment was made under protest and later, upon an application for a refund, the Commission and the highest court of the State sustained the validity of the fee and denied a refund.

On an appeal to the Supreme Court the State challenged the jurisdiction of the Court on the ground that no substantial federal question was involved, in view of prior decisions of the Supreme Court. The appellant, however, asked that the decisions relied upon by the State be overruled, asserting that the doctrine of such cases had been repudiated in *Alpha Portland Cement Co. v. Massachusetts,* 268 U. S. 203, 218 and *Cudahy Packing Co. v. Hinkle,* 278 U. S. 460, 466.

On the appeal, however, the Supreme Court took jurisdiction and decided the case on its merits, affirming the decision of the Court of Appeals of Virginia, in an opinion by MR. JUSTICE BRANDEIS.

In deciding the case consideration was given to the appellant's contentions that the fee necessarily burdens interstate commerce, denies due process, and denies equal protection of the laws. Rejecting these contentions Mr. Justice Brandeis first pointed out that Virginia by imposing this entrance fee recognized the constitutional right of the company to carry on interstate business in the State without payment of a fee, but pointed out also that no right to do an intrastate business is guaranteed by the Federal Constitution unless the State's consent is obtained. It was noted that the

terms on which a foreign corporation may do local business is a matter of state policy. In this connection the Court said:

"Whether the privilege shall be granted to a foreign corporation is a matter of state policy. Virginia might refuse to grant the privilege for any business, or might grant the privilege for some kinds of business and deny it to others. It might grant the privilege to all corporations with small capital while denying the privilege to those whose capital or resources are large. It might grant the privilege without exacting compensation; or it could insist upon a substantial payment as a means of raising revenue.

"As the entrance fee is not a tax, but compensation for a privilege applied for and granted, no reason appears why the State is not as free to charge $5,000 for the privilege as it would be to charge that amount for a franchise granted to a local utility, or for a parcel of land which it owned."

The Court added that there was nothing to show that the charge of $5,000 was unreasonable, and said:

"Even if the Federal Constitution conferred upon every foreign corporation the right to enter any State and carry on there a local business upon paying a reasonable fee, there is nothing in the record to show that the $5,000 charged is more than reasonable compensation for the privilege granted. The payment required is a single, non-recurrent charge—a payment in advance for a privilege extending into the long future."

The appellant contended also that a fee dependent wholly on the authorized capital stock necessarily burdens interstate commerce, arguing that the authorized capital stock represents property located in other states and foreign countries. Rejecting this contention also, the Court said:

". . . But this is not true. Authorized capital has no necessary relation to the property actually owned or used by the corporation; furthermore, the fee for which it is the measure represents simply the privilege of doing a local business. Because the entrance fee does not represent either property or business being done, it is immaterial that in fixing its amount no apportionment is made between the property owned or the business done within the State and that owned or done elsewhere.

"The entrance fee is obviously not a charge laid upon interstate commerce; nor a charge furtively directed against interstate commerce; nor a charge measured by such commerce. Its amount does not grow or shrink according to the volume of interstate commerce or the amount of the capital used in it. The size of the fee would be exactly the same if the company did no interstate commerce in Virginia or elsewhere. The entrance fee is comparable to the charter, or incorporation, fee of a domestic corporation—a fee commonly measured by the amount of the capital authorized."

The appellant urged also that the exaction deprived the corporation of property without due process of law, because the amount of the fee was determined by reference to property outside the state. In answer to this contention the Court emphasized that the amount of the entrance fee is not measured by property either within or without the jurisdiction, but that on the conrary it was a fee charged for an opportunity granted, not arbitrary in amount.

Consideration was also given to the appellant's contention that the measure of the fee operated arbitrarily and unequally between the appellant and other foreign corporations seeking the same privilege in the State. This contention was likewise rejected, and in answer to it the Court stressed the fact that even if the corporation, before being admitted to the State was in position to complain of a denial of equal protection, there was still no basis for a charge of discrimination since every corporation with an authorized capital of more than $90,000,000 is required to pay the same fee.

In conclusion the Court distinguished the cases relied upon by the appellant.

Taxation—Income Tax—Sale of Corporate Property to Stockholders as Taxable Dividend

The sale by a corporation to its stockholders of stock issued by and acquired from another corporation, effected by an issue to the stockholders of rights to purchase the stock at a named price, is not taxable as a dividend under §§ 22 and 115 of the Revenue Act of 1928, where it does not appear that the sale was an implement for distributing corporate earnings to stockholders.

Palmer v. Helvering, 82 Adv. Op. 85; 58 Sup. Ct. Rep. 67.

The question involved in this case was whether a purported sale by a corporation to its stockholders of shares of stock issued by and acquired from another corporation, where the sale is effected by an issue to the stockholders of rights to purchase the stock at a certain price, constitutes a distribution of corporate earnings taxable as a dividend under §§ 22 and 115 of the Revenue Act of 1928.

The petitioner was a stockholder of American Superpower Company which acquired, through consolidation of public utility corporations, securities of the United Corporation in exchange for the stock of the consolidated corporations owned by Superpower. The securities received included preference stock of United, 2,210,583 shares of its common stock and 1,000,000 rights to subscribe for United common at any time for $27.50 per share. United was incorporated January 7, 1929, and the consolidation was effected two days later, at which time Superpower became entitled to its allotment. On January 23, 1929, the Directors of Superpower offered to its stockholders the privilege of purchasing United stock at $25 a share, one-half share of United for each share of Superpower common. These rights became void unless exercised by February 15, 1929. On that date the petitioner exercised his option and bought 3,198 shares of United at $25 a share. Superpower treated the transaction as a sale of United stock resulting in no change in its net earnings or assets.

The prices received by Superpower for shares distributed to its stockholders resulted in a substantial profit to it over the cost of the securities which it had exchanged for them. It reported the profit and paid a tax on it for the year 1929. On or about January 9th bankers who were active in promoting the consolidation purchased from United 400,000 shares of its stock at $22.50 per share. Shortly after Superpower arranged for distrubting United stock an active market developed for the sale of the subscription rights. On January 25th, 11,000 were sold at prices ranging from 11⅝ to 12⅜, resulting in a cost of $50 per share to purchasers upon the exercise of their rights. Between then and the end of the year, rights were sold at prices resulting in a cost per share of $50 to $63.

In 1929 the petitioner did not sell or dispose of any of the shares for which he subscribed or report them in his income tax returns for that year. The Commissioner ruled that the subscription rights were dividends and assessed a deficiency tax based on the market value of the rights on the dates the stockholders were first entitled to exercise them. This ruling the

Board of Tax Appeals reversed, holding that the distributions were sales of shares by Superpower to its stockholders and not dividends. It found that the fair value of United during January, 1929, was $25 a share. On appeal to the Circuit Court of Appeals of the First Circuit, the ruling of the Board of Tax Appeals was reversed. On a writ of ceritorari the ruling of the Circuit Court was reversed by the Supreme Court in an opinion by MR. JUSTICE STONE.

In reaching a decision of the controversy, Mr. Justice Stone first called attention to the fact that under the Revenue Act the mere purchase of property does not subject the purchaser to an income tax even though the purchase is at a price less than the true value of the property bought. In this connection, he said:

"By §§ 111, 112 and 113 of the Revenue Act of 1928, profits derived from the purchase of property, as distinguished from exchanges of property, are ascertained and taxed as of the date of its sale or other disposition by the purchaser. Profit, if any, accrues to him only upon sale or disposition, and the taxable income is the difference between the amount thus realized and its cost, less allowed deductions. It follows that one does not subject himself to income tax by the mere purchase of property, even if at less than its true value, and that taxable gain does not accrue to him before he sells or otherwise disposes of it. Specific provisions establishing this basis for the taxation of gains derived from purchased property were included in the 1916 and each subsequent revenue act and accompanying regulations."

§ 22 of the Revenue Act of 1928, however, includes dividends in gross income and defines dividends as "any distribution made by a corporation to its stockholders, whether in money or in other property, out of its earnings or profits." As to this provision, it was observed that while a sale of corporate assets to stockholders is, in a sense, a distribution, the transaction does not necessarily constitute a dividend as defined, since it may not result in any decrease in net worth, and would not result in a distribution of profits. It was observed further, on the other hand, that a sale of corporate property to stockholders for substantially less than its value may be as an effective distribution of profits as the declaration of a dividend. To transfer the transaction from the category of a sale to that of a dividend "it is at least necessary to make some showing that the transaction is in purpose or effect used as an implement for the distribution of corporate earnings to stockholders."

In the present case, however, the Court was of the opinion that the conclusion of the Board that the transaction was a bona fide sale was supported by the stipulated facts. As to this, MR. JUSTICE STONE said:

"The facts stipulated and the finding of the fair market value of the United Stock at the time of the adoption of the first plan for its distribution abundantly sustain the board's conclusion that the transaction—in form a sale—was not intended to be the means of a distribution of earnings to stockholders. There may be cases in which market quotations, after the subscription rights have been issued, are persuasive evidence of value as of the time when the plan was adopted, and hence of its purpose and probable effect. But we cannot say that the board here, in finding the value of the shares of the newly organized United as of the time of adoption of the first plan, did not consider the market prices of the rights. The findings are inferences which the board was free to draw from all the facts and circumstances disclosed by the record. Such a determination of fact is not to be set aside by a court even if upon examination of the evidence it might draw a different inference. . . We accept the findings as at least establishing that the plan was adopted by Superpower in good faith as a means of effecting a sale of its assets to stockholders at fair market value."

In view of this conclusion the issue was narrowed to the legal question whether the commitment of Superpower to the sale of United stock at the then fair market value, and the subsequent distribution to stockholders, changed the transaction from a sale to a dividend by reason of the fact that in the meantime the rights sold at substantial prices or the stock itself sold at prices substantially above that fixed in the option.

Having concluded that the transaction was *intended* as a sale and not a dividend, two questions were presented, (1) whether the issuance of rights to subscribe constituted a dividend, and, if not, (2) whether the distribution became a dividend if the value of the property at the time the exercise of the right is more than the purchase price. Ruling in favor of the petitioner on both of these questions, MR. JUSTICE STONE said, as to the first:

"The mere issue of rights to subscribe and their receipt by stockholders, is not a dividend. No distribution of corporate assets of diminution of the net worth of the corporation results in any practical sense. Even though the rights have a market or exchange value, they are not dividends within the statutory definition. . . They are at most options or continuing offers, potential sources of income to the stockholders through sale or the exercise of the rights. Taxable income might result from their sale, but distribution of the corporate property could take place only on their exercise. The question, then, is whether the distribution which results from the exercise of the rights must be regarded as a dividend if the reasonable value of the property at the time of exercise is more than the purchase price."

As to the second question, the opinion states, in part:

"We think that a distribution of assets by a corporation to its stockholders by means of a sale, to which it is committed by appropriate corporate action at a time when their sale price represents their reasonable value, is not converted into a dividend by the mere circumstance that later, at the time of their delivery to stockholders, they have a higher value. The meaning of § 115 must be sought in the light of the situations to which it must be applied. It does not purport to withdraw corporations and their stockholders wholly from the operation of §§ 111, 112 and 113, taxing the profits of purchasers. It cannot be taken to withhold from corporations the power at their own election to effect, by workable means, sales of their assets to stockholders at fair value, subject to that incidence of taxing statutes which usually attends sales. The distribution contemplated and defined by it as a dividend is one to be effected by corporate action. Hence, in determining whether a given transaction is 'sale' or 'dividend,' the corporate action which results in one or the other must be scrutinized in the light of the circumstances at the time when the action is taken, and of the conditions under which in practice it must be taken.

"The only feasible method by which a corporation of large membership can effect a sale of its assets to stockholders is by tendering to them rights to subscribe, a method whose indispensable first step is the adoption, by appropriate corporate action, of the terms of the offer. Between the dates of the first step and of subscription a substantial period of time must elapse, during which the rights may, and often do, become the subject of violent market fluctuations. Any vendor who offers property for sale at a named price similarly carries the burden of risk that the property may increase in value between offer and acceptance. If the sale is by executory contract he also carries the risk between promise and performance. It is an inseparable incident of every sale except those in which conditions admit of payment for the property simultaneously

with its tender for sale, a procedure which may not be available to a corporation seeking to sell its property to stockholders.

"It is a solecism to speak of a corporation as distributing its profits for the sole reason that, after it has unavoidably assumed that risk in order to effect a sale of its property to stockholders at a fair price, the property increases in value. Price, which in the present case is decisive of the issue, must be determined in the light of the situation existing when price is fixed. If the option price is fair when fixed the transaction is a tender for a sale and not for a distribution of profits—a dividend as defined by § 115. If, pending execution of the plan, there were no change in the value of the stock the transaction would throughout concededly retain its character as a sale. Its character is not altered by the fluctuations of a speculative market, after the corporate action which defines the character of the transaction has been taken."

Taxation: State Income Tax: Tax Exempt Bonds —Impairment of Obligation of Contract

Under legislation enacted in Iowa prior to 1934, Iowa School District bonds and certain other bonds were exempt from taxes. The enactment of a personal net income tax by that State in 1934 and its application to income from such bonds did not impair the obligation of the contract of exemption from taxation, since provisions exempting from taxation are to be strictly construed, and a proper construction of the exemption limited it to ad valorem taxes, which did not necessarily include exemption from other forms of taxation.

Hale et al vs. Iowa State Bd. of Assessment and Review, 82 Adv. Op. 66; 58 Sup. Ct. Rep. 102.

In this case the issue for determination was stated in the opinion of the Court as follows:

"The question is whether interest upon bonds of the State of Iowa or its political subdivisions may be included in the assessment of a [state] tax on the net income of the owners without detracting from earlier exemptions in respect of taxes upon property and without an unconstitutional impairment of the obligation of contract."

It appeared that the appellants, residents of Iowa in 1934 and thereafter, owned bonds of the Iowa School District, Iowa Road Bonds, Iowa County bonds, and an Iowa Soldiers' Bonus Bond, of a total face value of $752,900. The statutes in force when the bonds were issued and when acquired by appellants provided in varying terms that said bonds "are not to be taxed," "shall not be taxed," or "shall be exempt from taxation." At that time Iowa was without an income tax, but in 1934 such a tax was enacted. In the 1935 assessment of the income tax, interest on the appellants' bonds was included. By appropriate proceedings the tax was contested and upheld by the Iowa Supreme Court. That Court assumed that the statutes of exemption should be treated as contractual provisions and not merely declarations of a legislative policy, subject to revocation at pleasure. On that construction, the Court interpreted the contracts as limited to taxes laid upon property and not as touching taxes in the nature of an excise upon the net income of the owner. On appeal the ruling of the Iowa Supreme Court was sustained by the Supreme Court of the United States by a divided bench. MR. JUSTICE CARDOZO delivered the prevailing opinion.

In this opinion attention was given to the pivotal inquiry whether the contract arising from statutory provisions was limited in scope and operation as held by the State Court. The limitation on the exemption was thought to be supported first by the statutory system of taxation considered as a whole. As illustrative of this the exemption in the Supplemental Code of 1915 as then contained in Subdivision 1 of section 1304 was referred to. Other subdivisions exempted other items—grounds and buildings for public libraries, household furniture up to a prescribed value, farming utensils of a farmer, and other kinds of property. Concluding from this that the exemption was addressed to *ad valorem* taxes, MR. JUSTICE CARDOZO said:

". . . The section opens with the statement that 'the following classes of property are not to be taxed,' and then enumerates the classes. But the scope of the exemption is likely to be exaggerated unless the next preceding section (1303) is read at the same time. 'The board of supervisors of each county shall annually, at its September session, levy the following taxes upon the assessed value of the taxable property in the county,' a mandate clearly addressed to the levy of *ad valorem* taxes only. The inference is a fair one that section 1304 did not exempt the items there enumerated from taxation of every form and for every purpose. It withdrew them from the operation of the levy commanded by the section next preceding. . . ."

This view of the scope of the exemptions was based upon the decisions of the Iowa Court in this and other cases. Decisions of that Court have adhered to the principle that contracts of tax exemption are to be strictly construed, and other decisions have indicated that an exemption from *ad valorem* taxes does not extend to an excise tax. The opinion declared that the ruling of the Iowa courts that a tax on net income is outside the scope of the exemption is not unreasonable, but is supported by judicial decision, notwithstanding that a contrary doctrine has also been adopted by some courts. The rule to be adopted by the Supreme Court in such circumstance was then stated:

". . . Our duty does not call upon us to determine which view we would accept as supported by the better reason if the choice were an original one for us, unaffected by the view accepted in the court below. Enough for present purposes that with authority so nearly balanced the Iowa construction of the contract is at least not plainly wrong. The propriety of our keeping to it is the clearer when we bear in mind that there were Iowa decisions pointing the same way before appellants became owners."

Moreover, the view was taken that even if the income tax is not substantially an excise, decisions of the Supreme Court forbid it to condemn as unreasonable a classification of the tax that treats it as something different from a property tax. After a brief review of such decisions, MR. JUSTICE CARDOZO said:

"The doctrine of these decisions, we think, is applicable here. We do not overlook the argument that the promise to pay interest may be part of the obligation of a contract as much as the promise to pay principal. To concede this counts for little if the distinction between an excise and a property tax, or between the different meanings of a property tax, is not permitted to escape us. Unless the foregoing analysis is faulty, the tax complained of by appellants is not laid upon the obligation to pay the principal or interest created by the bonds, at all events within the meaning of the contract of exemption. The tax is laid upon the net results of a bundle or aggregate of occupations and investments. Under a statute so conceived and framed a man may own a quantity of state and county bonds and pay no tax whatever. The returns from his occupation and investments are thrown into a pot, and after deducting payments for debts and expenses as well as other items, the amount of the net yield is the base on which his tax will be assessed. . . In the light of all the precedents brought together in this opinion, we cannot say that a tax assessed on such a base is a plain violation of any contract of exemption to be discovered in the laws of Iowa.

"Doubtless a contract of exemption can be phrased in such terms as to forbid the imposition of a net income tax or indeed a tax of any sort. Bonds issued by the Government of the United States are sometimes exempt by their

express terms from income taxes to any degree . . sometimes from income taxes other than surtaxes or excess profits taxes. . . Such were the Liberty Bonds considered by this court in *Macallen Co. v. Massachusetts,* 279 U. S. 620. Broad also was the exemption given to the Federal Farm Loan bonds considered in the same case, at least in respect of taxes levied by the states, for the bonds were declared expressly to be federal instrumentalities. . ."

MR. JUSTICE SUTHERLAND delivered a dissenting opinion concurred in by MR. JUSTICE MCREYNOLDS and MR. JUSTICE BUTLER. In this opinion the view was expressed that the exemption provisions clearly excluded all taxes and that there was no warrant for limiting the exemption to *ad valorem* taxes. In this connection, MR. JUSTICE SUTHERLAND said:

"At the time the bonds here involved were purchased, the statutes of Iowa expressly provided that they 'are not to be taxed' or 'shall not be taxed' or 'shall be exempt from taxation.' These are plain words, and there is no room for construction. When the language is clear, it is conclusive. 'There can be no construction where there is nothing to construe. . .'

"We are not concerned with the name given to the tax. The exemption is in unqualified terms, and includes *all* taxes. And I see no warrant for saying that the exemption must be limited to so-called *ad valorem* taxes. The exemption is not in the form or nature of a proviso to the section fixing the time and providing for the levy of such taxes, but is a substantive enactment standing independently and complete in itself. Nor do I see any ground for confining it to taxes then known to the Iowa law. Such an all-embracing exemption cannot be avoided by the invention of a new tax. To me, it seems evident that if any tax be imposed upon the bonds, the contract is impaired. It likewise seems evident that the tax here is imposed on the bonds themselves."

He pointed out also that there is no legal difference between the obligation to pay the interest and to pay the principal of the bonds, and in conclusion added:

"The force of what has been said cannot be avoided by merely calling the tax an excise. If a tax falls upon the bond and lessens its proceeds, either in respect of principal or interest, it is a tax on the bond, and cannot be made something else by resort to the vocabulary or by employing some circuitous method of imposing it. It is well settled, at least generally, that 'what cannot be done directly . . . cannot be accomplished indirectly by legislation which accomplishes the same result.' . . . I am unable to subscribe to that philosophy which seems to teach that a forbidden result may nevertheless be achieved if only some delusive and devious way of achieving it can be found."

Taxation — Income Tax — Refunds Allowable Though Deficiency Exists on Earlier Tax Barred by Limitation

A taxpayer's claim to a refund of an overpayment of a federal income tax may not be defeated by reason of the fact that a deficiency exists on a tax for a prior year, if the collection of the deficiency is barred by limitation. Where collection of the deficiency is barred, an overpayment in a later year may not be credited against the barred deficiency.

The date of allowance of refund or credit is the date on which the Commissioner first signs a schedule of overassessments.

McEachern vs. Rose, 82 Adv. Op. 81; 58 Sup. Ct. Rep. 84.

In this case decision was rendered on the question whether certain overpayments of income taxes for 1929 to 1931, inclusive, are so related to a 1928 tax on income which should have been assessed, but was not, as to preclude recovery of the overpayments, although collection of the 1928 tax was barred by the statute of limitations.

It appeared that the petitioner was administrator of a decedent's estate. The decedent, in 1924, had sold 500 shares of stock of an insurance company for $300,000, at a net profit of $295,000 over the 1918 cost. Ten per cent of the purchase price was paid at the time of sale, and the balance made payable in ten annual installments. As permitted by law the decedent elected to return the profit for income taxation on the installment basis and after his death his administrator filed income tax returns for the estate for the years 1928 to 1931 inclusive, showing in each year a sale of 50 shares of the stock at a net profit of $29,500. These returns were erroneous in point of law and fact, since the petitioner actually sold no stock in any year, and by reason of the provisions of §44(d) of the Revenue Act of 1928, the capital gain on the unpaid installments was taxable in 1928 rather than in the later years. Under §44(d) the transfer of an installment obligation on the death of the payee capitalizes the unpaid installments of the contract and results in a taxable gain to the estate of decedent, measured by the difference between fair market value of the obligation at time of payee's death and its unrecovered cost. By §113 of the Act the basis for computing annual profits on the installments paid after decedent's death is the fair market value of the contract at the time of his death. The unpaid 1928 tax properly computed exceeded the overpayments made in the years 1929 to 1931, inclusive. At the trial, the District Court overruled the Collector's contention that the petitioner was estopped to deny that the sales of stock were made and profit accrued as reported in his returns for the years in question, and also his contention that in any case, on equitable principles, no recovery could be had for overpayments in those years, as they were less than the tax which should have been paid in 1928. On appeal the Circuit Court reversed this ruling but its decision was reversed by the Supreme Court, on certiorari in an opinion by MR. JUSTICE STONE.

The principal question considered was whether equitable principles preclude recovery. In approaching a solution of this question Mr. Justice Stone stated that it may be assumed that equitable considerations would preclude recovery in the absence of statutory provisions, but added that Congress has set limits to the extent to which courts might otherwise go in curtailing a recovery of overpayments of taxes, because of the taxpayer's failure to pay other taxes which might have been but were not assessed against him. In this connection, it was pointed out that §607 of the Act provides that any payment of a tax after the period of limitations has expired shall be considered as an overpayment and directs that it be "credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim." It was noted also that §609(a) provided that "Any credit against a liability in respect of any taxable year shall be void if any payment in respect of such liability would be considered an overpayment under section 607." As to this, MR. JUSTICE STONE said:

"These provisions preclude the Government from taking any benefit from the taxpayer's overpayment by crediting it against an unpaid tax whose collection has been barred by limitation.

"It is plain that these provisions forbid credit of the overpayments of taxes for 1930 and 1931, which were made after collection of the 1928 tax was barred. If petitioner had then paid the 1928 tax there would have been an overpayment of the tax, refund of which is made mandatory by

§607. Credits against the tax of overpayments of taxes assessed for other years, if made at that time, could not stand on any different footing under the provisions of §609. The right of the government to credit the overpayments upon the earlier unpaid tax could arise only when the overpayments occurred; but since at that time collection of the 1928 tax was barred by limitation, and payment of it would be an overpayment, credit against it of the 1930 and 1931 overpayments was forbidden by §609."

Different considerations, however, were thought to apply to the 1929 overpayment. When it was made, recovery of the 1928 tax was not barred, and the Commissioner was not prevented by §609 from crediting the overpayment on the 1928 tax, although he did not do so. In this connection it was observed that §322 authorized the credit of an over-payment of any tax against any income tax "then due" from the taxpayer and directs refund of any balance. It was found unnecessary to inquire whether the 1928 deficiency was due before the tax was assessed, since there could be no credit against the tax of the 1929 overpayment before the amount of the latter was ascertained and allowed, and when that took place the collection of the 1928 tax was barred, so that no credit of the overpayment against it could be made.

After review of earlier practice, the Court stated that under the Act of 1932 the date deemed to be the time of allowance of credit or refund is fixed at the date on which the Commissioner first signs a schedule of overassessments. In the instant case that date came after recovery of the 1928 tax was barred. The operation of the provisions affecting refunds for overpayments and credits for overpayments against prior taxes and their application in the present case were summed up as follows, in the opinion:

"The date of the claim for refund and the date of the allowance of the credit which, according to §1104, was that of the approval by the commissioner of the schedule of overassessments, came after recovery of the 1928 tax was barred. If petitioner had then paid the tax he could have recovered it back as an overpayment under §607; accordingly, credit against the tax of 1929 overpayment is prohibited by § 609, as are like credits for the overpayments of 1930 and 1931.

"The similar treatment accorded by the statutes to credit against an overdue tax, and to payment of it; the prohibition of credit of an overpayment of one year against a barred deficiency for another; and the requirement that payment of a barred deficiency shall be refunded, are controlling evidences of the Congressional purpose by the enactment of §§607 and 609 to require refund to the taxpayer of an overpayment, even though he has failed to pay taxes for other periods, whenever their collection is barred by limitation."

Taxation—Federal Income Tax—Taxable Status of Payments as Gifts or Compensation—Review of Decision of Administrative Boards

Compensation and gifts constitute mutually exclusive categories for purposes of the federal income tax. On the facts involved, it was held that payments made by one corporation to employees of another corporation (the latter having transferred part of its assets to the former) were gifts, and hence not taxable as compensation to the recipients.

Bogardus vs. Commissioner of Internal Revenue, 82 Adv. Op. 90; 58 Sup. Ct. Rep. 61.

Involved in this case was a question as to whether a certain payment made to the petitioner was compensation, subject to the federal income tax, or a gift, exempt from it. The Commissioner, the Board of Tax Appeals and the Circuit Court of Appeals were of the opinion that the payment was compensation subject to the tax; but on certiorari the Supreme Court, by divided bench, reversed the judgment of the Circuit Court. MR. JUSTICE SUTHERLAND delivered the prevailing opinion.

It appeared that the payment in question was made to petitioner by Unopco Corporation. The sum paid was part of a distribution made by Unopco to the employees of another corporation, Universal Oil Products Company.

Universal was organized in 1914, its only asset being a patent for refining petroleum and manufacturing gasoline. Later it acquired other patents, and, in 1931, sold all its stock to United Gasoline Corporation. Prior to this sale, however, Unopco was organized and acquired certain assets of Universal of a value of over $4,000,000. Up to this time Unopco had never engaged in any business activities and thereafter its only business was the investment and management of the assets thus acquired. All of the stockholders of Universal became stockholders of Unopco with the same proportionate holdings, but none of them, after the sale of the Universal stock, held any stock in Universal or in United Gasoline Corporation.

A few days after the sale, the stockholders of Unopco had a meeting at which they voted a "gift or honorarium" to former employees, attorneys and experts of Universal in the total amount of $607,500. This was paid to some 64 persons in recognition of their valuable and loyal services in the past, the payments ranging from $100,000 to $500. Some of the recipients had been out of Universal's employment for many years, and one was the sister of an employee who was killed in 1919. It appeared that Unopco was under no legal or other obligation to make the payments and that the payments were not intended as compensation for any services. Moreover none of the three corporations claimed any income tax deductions on account of the payments.

Explaining the ruling of the Board of Tax Appeals and the effect of that ruling, MR. JUSTICE SUTHERLAND said:

"The Board of Tax Appeals concluded that, from a careful consideration of all the evidence, 'the payments made by Unopco to the petitioners and others were additional compensation in consideration of services rendered to Universal and were not tax-free gifts.' This, as we recently have pointed out, is 'a conclusion of law or at least a determination of a mixed question of law and fact. It is to be distinguished from findings of primary, evidentiary or circumstantial facts. It is subject to judicial review and, on such review, the court may substitute its judgment for that of the board.' If the conclusion of the board be regarded as a determination of a mixed question of law and fact, it has, as we shall presently show, no support in the primary and evidentiary facts."

The statutory provisions cited were thought to be plain and direct. Section 22(a) of the Act (45 Stat. at L. 791) provides that "gross income" among other things includes "compensation for personal services of whatever kind and in whatever form paid." Subdivision (b)(3) provides that "The value of property acquired by gift, bequest, devise or inheritence" shall not be included in gross income or subject to the federal income tax. The Circuit Court of Appeals took the view that payments of the kind involved may be gifts under the one section and compensation under the other. Rejecting such conclusion, and ruling that the two cate-

gories are mutually exclusive, MR. JUSTICE SUTHERLAND said:

"Such a view of the statute is inadmissible and confusing. The statute definitely distinguishes between compensation on the one hand and gifts on the other hand, the former being taxable and the latter free from taxation. The two terms are, and were meant to be, mutually exclusive; and a bestowal of money cannot, under the statute, be both a gift and a payment of compensation. . .

"If the sum of money under consideration was a gift and not compensation, it is exempt from taxation and cannot be made taxable by resort to any form of subclassification. If it be in fact a gift, that is an end of the matter; and inquiry whether it is a gift of one sort or another is irrelevant. This is necessarily true, for since all gifts are made non-taxable, there can be no such thing under the statute as a taxable gift. A *claim* that it is a gift presents the sole and simple question whether its designation as such is genuine or fictitious—that is to say, whether, though *called* a gift, it is in *reality* compensation."

A review of the pertinent facts was then had, which the majority opinion summed up as follows:

"In sum, then, the case comes to this: The stockholders of the Unopco, having at the time no connection with the Universal company but rejoicing in the fact of their own great good fortune, and mindful of the former loyal support of a number of employees of the Universal company, and desiring to remember them 'in the form of a gift or honorarium,' resolved to make through the Unopco company the distribution in question. In doing so, they were moved, as Judge Swan said in his dissenting opinion below, to an act of 'spontaneous generosity.' We agree with this dissenting opinion of Judge Swan, and the dissenting opinion of Judge Morton in *Walker* v. *Commissioner, supra,* as stating the correct view of the matter."

A brief analysis was then made of certain aspects of the case in answer to contentions which might be thought to militate against the conclusion reached.

MR. JUSTICE BRANDEIS, MR. JUSTICE STONE, MR. JUSTICE CARDOZO and MR. JUSTICE BLACK dissented.

In the dissenting opinion the view was expressed that many decided cases show that the categories of "gift" and "compensation" are not always mutually exclusive. The proper test was thought to be the intention with which payment is made rather than the presence or absence of consideration. In elaboration of this, the dissenting opinion states:

". . . the categories of 'gift' and 'compensation' are not always mutually exclusive, but at times can overlap. What controls is not the presence or absence of consideration. What controls is the intention with which payment, however voluntary, has been made. Has it been made with the intention that services rendered in the past shall be requited more completely, though full acquittance has been given? If so, it bears a tax. Has it been made to show good will, esteem, or kindliness toward persons who happen to have served, but who are paid without thought to make requital for the service? If so, it is exempt.

"We think there was a question of fact whether payment to this petitioner was made with one intention or the other. A finding either in his favor or against him would have had a fair basis in the evidence. It was for the triers of the facts to seek among competing aims or motives the ones that dominated conduct. Perhaps, if such a function had been ours, we would have drawn the inference favoring a gift. That is not enough. If there was opportunity for opposing inferences, the judgment of the Board controls."

Corporate Dissolution—Bankruptcy Corporate Reorganization

Two years after an Illinois corporation has been dissolved pursuant to the law of that State it is without power to take action under Sec. 77B of the Bankruptcy Act, for a reorganization—even though mortgage foreclosure suits against the corporation are pending in state courts and a state court receiver in possession of its property, subject to mechanics' lien sales.

Chicago Title and Trust Co. v. 4136 Wilcox Building Corp., 82 Adv. Op. 109; 58 Sup. Ct. Rep. 125.

The respondent was an Illinois Corporation. It owned a building in Chicago and the land on which it stood, and nothing more. By judicial decree it was dissolved for failure to make statements and pay fees required by Illinois law, and its charter was duly annulled.

Mechanics' lien proceedings and mortgage foreclosure proceedings were instituted prior to the dissolution. After the decree of dissolution the corporate property was sold by decree in the mechanics' lien suit. The right of redemption from that sale expired as to the corporation August 5, 1932, and as to its creditors, November 5, 1932. No redemption was ever made or attempted.

In May, 1935, three persons acquired all the shares of stock of respondent, held meetings, elected officers and directors and caused resolutions to be passed authorizing the filing of a petition by the respondent for its reorganization under Sec. 77B of the Bankruptcy Act. Petitioner, as trustee, appeared, answered, set up the dissolution proceedings, denied that respondent was a corporation and averred that the petition was not filed in good faith.

The district court referred the petition to a special master, who reported that the petition had been filed in good faith, that respondent had legal capacity to file it. The report was confirmed, a temporary trustee appointed, the state court receiver ordered to turn over the property to the trustee and further prosecution of the foreclosure proceedings was enjoined.

On appeal the order of the district court was affirmed, one judge dissenting. On certiorari, the decree was reversed by the Supreme Court.

The opinion of the Court was pronounced by MR. JUSTICE SUTHERLAND. After stating fully the facts, he defined the issue as follows:

"The sole question now for determination is whether under the facts just detailed, a corporation, dissolved and put out of existence by the State which created it, may, nevertheless, itself invoke the powers of a court of bankruptcy under Sec. 77B."

As to the legal status of the corporation after the dissolution, he said:

"The decisions of this court are all to the effect that a private corporation in this country can exist only under the express law of the state or sovereignty by which it was created. Its dissolution puts an end to its existence, the result of which may be likened to the death of a natural person. There must be some statutory authority for the prolongation of its life, even for litigation purposes." (Citing many cases.)

"Sections 14 and 79 of the Illinois Statute seem plain enough on their face; but if any doubt as to their meaning and effect would otherwise exist, that doubt has been set at rest by the decisions of the Illinois appellate courts. In *Life Ass'n of America v. Fassett*, 102 Ill. 315, decided before the sections under consideration were enacted, the state supreme court held that it was the settled policy of the state that upon the dissolution of domestic corporations, however effected, they were to be regarded as still existing for the purpose of settling up their affairs and having their property applied for the payment of their just debts. . . In *American Exch. Bank v. Mitchell*, 179 Ill. App. 612, 615-616, the general rule was announced that after a corporation is dissolved, it is incapable of maintaining an action: and that all such actions pending at the time of dis-

solution abate, in the absence of a statute to the contrary. The state decisions following the enactment of these sections make it clear that this general rule still remains in force in Illinois except for the specific modifications in respect of time and circumstance set forth in Secs. 14 and 79. . .

"It is plain enough, under the Illinois statute, that after the expiration of two years from the date of its dissolution, respondent was without corporate capacity to initiate any legal proceeding—including a proceeding under Sec. 77B, unless we are able to say that the statute, in its terms or in its application, is in conflict with Sec. 77B. While state laws in conflict with the laws of congress on the subject of bankruptcies are suspended, they are suspended 'only to the extent of actual conflict with the system provided by the Bankruptcy Act of Congress.'"

Pointing out the distinction between dissolution and liquidation, he said:

. . . "Liquidation of a corporation is no part of the purpose of the dissolution; nor is insolvency or liquidation involved in the proceedings to enforce the mechanics' liens or foreclose the mortgages. Quite evidently, the latter were simply ordinary proceedings to enforce liens against the property subject thereto."

As to the conflict between Federal and State power, he said:

"How long and upon what terms a state-created corporation may continue to exist is a matter exclusively of state power. . . . The circumstances under which the power shall be exercised and the extent to which it shall be carried are matters of state policy, to be decided by the state legislature. There is nothing in the federal Constitution which operates to restrain a state from terminating absolutely and unconditionally the existence of a state-created corporation, if that be authorized by the statute under which the corporation has been organized. And it hardly will be claimed that the federal government may breathe life into a corporate entity thus put to death by the state in the lawful exercise of its sovereign authority. . . .

"The aim of this proceeding under Sec. 77B is to bring about a reorganization of a corporation which has been dissolved and shorn of its capacity to initiate any legal proceeding by the state which possesses, in respect of the corporation, the power of life and death. It is not a proceeding on behalf of creditors. It is not a liquidation proceeding having for its object the distribution of the corporate assets. The dissolution was adjudged because the corporation had disobeyed the laws of the state. For that reason the state prohibited the continuance of the corporate enterprise. The stockholders, however, now seek to escape the penalty for this dereliction by resuscitating and continuing the corporation, and, to that end, invoke the aid of a federal statute. This is simply an attempt to thwart a valid state law. Whether the enterprise be continued under the original name and charter of the corporation, or in some new corporate name or guise, can make no difference. Either course would contravene the legislatively-declared policy of the state. Section 77B cannot be regarded as countenancing such a result."

MR. JUSTICE CARDOZO dissented. His point of divergence, from the views expressed by MR. JUSTICE SUTHERLAND, was based upon the consequences of that "fragment of corporate power" which remained under the laws of Illinois, notwithstanding the dissolution.

His line of thought is indicated by the following excerpts:

"I am unable to concur in the opinion of the Court.

1. Respondent, though dissolved, was still a corporation in such a sense and to such a degree as to have capacity to maintain a proceeding in bankruptcy for the liquidation of its assets.

By Bankruptcy Act Sec. 4 (11 U. S. C. Sec. 22 (a)), any corporation, with exceptions not now material, may become a voluntary bankrupt.

By Bankruptcy Act Sec. 1 (6) (11 U. S. C. Sec. 1 (6)), "'corporations' shall mean all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships. . . ."

Respondent, when it filed its petition in the bankruptcy court. was still in possession of some of the privileges and powers of private corporations not possessed by individuals or partnerships. True, a decree of dissolution had been entered by a court of Illinois, the place of its domicile. True, two years had gone by since the making of that decree. None the less, the corporation still had the power, if suits were then pending either in its favor or against it, to litigate in its corporate name and through its corporate officials. (Citing Illinois cases.) With the license of Illinois, respondent was actively defending suits for the foreclosure of mortgages on its property when it went into the federal court. A fragment of corporate power was thus untouched by dissolution. Within the definition of the Bankruptcy Act, the body that retained this power, and indeed exercised it too, was still a corporation. . . Here the state has elected to keep the corporation in existence, maimed but still alive. In choosing to create or continue an artificial entity, though with limited and narrow powers, the state subjects its creature to the bankruptcy power of the Congress in so far as that power is directed at juristic beings of that order. . . It is not within the competence of Illinois by any form of words to preserve the artificial entity for a purpose of her own and destroy it for the purpose of withdrawal from the supremacy of federal law."

The second propostion involved in the dissent was stated as follows:

A proceeding under Section 77B is styled one to give effect to a corporate reorganization. Whatever its form or label, it derives its origin and vitality from the bankruptcy power. . . Only because the remedy is traceable to that power is it constitutional and valid. The notion is baseless that reorganization, even when initiated on the petition of the debtor, is solely or chiefly for the benefit of shareholders. It is even more distinctively and commonly for the benefit of creditors. . . The old form of bankruptcy had in view a liquidation of the assets for cash and nothing else, a method of disposing of them that might result in needless sacrifice. The new form of bankruptcy is more flexible and often more efficient, permitting as it does, a disposition of the assets upon credit as well as for cash, and in consideration of shares of stock or bonds to be issued by the buyer. Whoever, being a corporation, may resort to the old form, is at liberty, acting in good faith, to resort to the new. This is so by the express mandate of the statute, which tells us (Sec. 77B; 11 U. S. C. Sec. 207 (a)) that "any corporation which could become a bankrupt under section 4 of this Act" may petition in the new proceeding. By that test a dissolved corporation with capacity requisite to apply to a court of bankruptcy for a liquidation of its assets has the capacity requisite to apply for a reorganization of its business. As to this, the lower federal courts are in general accord. (Citing their decisions.) Their opinions vindicating that conclusions are instructive and convincing."

The limitations on the methods of reorganization available to a corporation "already doomed" were recognized and illustrated and the extent of the divergence of opinion between the majority and the minority view, was disclosed by the closing sentence of the dissent:

The single question presented to us by the petition for certiorari is one of jurisdiction. Did a court of bankruptcy have power to entertain the proceeding at the instance of such a suitor? I hold that power did not fail.

MR. JUSTICE STONE and MR. JUSTICE BLACK joined in the dissent.

Attorneys Arguing Cases in Which Opinions Were Delivered November 8, 1937

No. 1. *Atlantic Refining Company, vs. Virginia.* Re argued October 11, 1937, by Mr. T. Justin Moore for appellant and by Mr. Abram P. Staples for appellee.

No. 2. *Kelly vs. State of Washington, ex rel. Foss Company, Inc., et al.* Reargued October 11 and 12, 1937, by Mr. E. P. Donnelly for petitioners and by Mr. Glenn J. Fairbrook for respondents and by Mr. Assistant Solicitor General Bell as *amicus curiae,* by special leave of Court.

No. 5. *Dodge, et al., vs. Board of Education of Chicago.* Reargued October 14, 1937, by Mr. Allan J. Carter for appellants and by Mr. Frank S. Righeimer and Mr. Richard S. Folsom for appellees.

No. 6. *McEachern, Administrator, etc.. vs. Rose, Former Collector of Internal Revenue, etc.* Argued October 14 and 15, 1937, by Mr. W. A. Sutherland for petitioner and by Mr. Guy Patten for the respondent.

No. 14. *Federal Trade Commission, vs. Standard Education Society, et al.* Argued October 18, 1937, by Mr. Assistant Attorney General Jackson for petitioner and by Mr. Henry Ward Beer for respondents.

No. 15. *Bogardus vs. Commissioner of Internal Revenue.* Argued Oct. 18 by Mr. William D. Whitney for petitioner and by Mr. A. F. Prescott for respondent.

No. 16. *Hale. et al., vs. Iowa State Board of Assessment and Review.* Argued October 18 and 19, 1937, by Mr. Alan Loth and Mr. William L. Hassett for appellants and by Mr. Clair E. Hamilton for appellee.

No. 19. *Palmer vs. Commissioner of Internal Revenue,* and No. 59. *Helvering, Commissioner, vs. Palmer.* Argued October 19, 1937, by Mr. Robert G. Dodge for Palmer and by Mr. Assistant Attorney General Morris for Helvering.

No. 20. *White, Individually and as Former Collector, etc., vs. Aronson, Trustee.* Argued October 20, by Mr. Paul A. Freund for petitioner, *pro hac vice,* by special leave of Court and by Mr. Israel Gorovitz and Mr. Samuel Gottlieb for respondent.

No. 21. *Groman vs. Commissioner of Internal Revenue.* Argued October 20 and 21, 1937, by Mr. Egbert Robertson for petitioner and by Mr. J. Louis Monarch for respondent.

No. 25. *Pennsylvania, ex rel. Sullivan, vs. Ashe.* Argued October 22, 1937, by Mr. William J. Hughes, Jr., and Mr. Bernard T. Foley for petitioner and by Mr. Adrian Bonnelly and Mr. Burton R. Laub for respondent.

No. 68. *Puget Sound Stevedoring Company, vs. Tax Commission of Washington.* Argued October 13 and 14, 1937, by Mr. John Ambler for appellant and by Mr. E. P. Donnelly for appellees.

No. 11. *United States vs. Williams.* Argued October 15, 1937, by Mr. Julius C. Martin for petitioner and by Mr. Frank C. Wade for respondent.

Decided By Opinion, Monday, November 15, 1937

No. 23. *Chicago Title and Trust Company, Successor Trustee, vs. Forty-one Thirty-six Wilcox Building Corporation;* and No. 24. *Same vs. Same.* Argued October 21, 1937, by Mr. Frank H. Towner for petitioner and by Mr. George I. Haight for respondent.

Unfair Trade Practices—Finality of Federal Trade Commission Findings

Federal Trade Commission vs. Standard Education Society, et al. 82 Adv. Op. —, 48 Sup. Ct. Rep. Vol. 58, p. 113 [No. 14, Decided Nov. 8, 1937.]

Certiorari to review a decree of the Circuit Court of Appeals for the Second Circuit which modified in part and reversed in part an order of the Federal Trade Commission requiring respondents to "cease and desist" from certain "unfair" practices in the methods of sale of their publications, Standard Reference Works, and New Standard Encyclopedia.

The Commission ordered respondents not falsely to represent to purchasers that the encyclopedias were presented as a gift and that purchasers were paying only for loose leaf supplements. The Circuit Court reversed this portion of the order. The Commission also ordered respondents not falsely to represent that the encyclopedias had been reserved to be given away without cost to selected persons and that the usual cost was much higher than the price at which they were being offered to the selected list. The Circuit Court affirmed this portion of the order. In an opinion by MR. JUSTICE BLACK, the Court held that the portion of the order reversed was designed to prevent a sales method of which the part affirmed was an integral feature, and that, since the findings of the Commission and ample testimony underlying them showed this to be so, and since the plan as a whole was deceptive and unfair under the Act, the Commission's order should have been wholly affirmed under that provision of the Act which makes the findings of the Commission conclusive as to the facts if supported by testimony. The Commission's order also forbade the use of names of persons as contributors without their consent if they had not actually contributed to or helped edit the work. The Circuit Court modified that order by excluding from its operation the names of all persons who had contributed to a predecessor work from which the present work is derived. This, the opinion holds to be error, since the parties agreed that the scope of the order did not prevent the use of the names of those original contributors whose contributions have been carried forward into the present work, and since as to others, the order was considered by the Court to be justifiable. The Circuit Court reversed as not supported by the findings and testimony, that part of the order which forbade the use of testimonials not given by the person whose name was used. The opinion holds that the record shows this to be error. The Circuit Court excluded from the operation of the Commission's order the individual managers and sole stockholders of respondent corporation. This the opinion also declares to be error, since the testimony in the record showed that the corporation was closely held and entirely controlled by the individuals included in the order, and since, if the purpose of the order was to be effective, the individuals named must obey it.

The decree of the Circuit Court was, therefore, reversed, except as to that part which modified clause 10 of the Commission's order.

State Taxation—Interstate Commerce

Puget Sound Stevedoring Company vs. Tax Commissioner of Washington, 82 Adv. Op. 64, 58 Sup. Ct. Rep. 72 [No. 68, Decided Nov. 8, 1937.]

Appeal from the Supreme Court of Washington involving the Constitutionality of a state business privilege tax, (Washington Law 1935, C. 180) measured by a percentage of gross income, as applied to a stevedoring corporation serving vessels engaged exclusively in interstate or foreign commerce. The business of the company was of two classes (1) the loading and discharge of cargoes by longshoremen subject to its own control, (2) the supplying of longshoremen to shipowners or masters without directing or controlling the work of loading or unloading. The Court, in an opinion by MR. JUSTICE CARDOZO, held that as to (1) the tax was an unconstitutional burden on interstate and foreign commerce, since the work of loading and unloading cargo, when not prolonged beyond the stage of transportation and its reasonable incidents, is an essen-

tial feature of that commerce. As to (2), he held that the company was properly subject to the tax, since, as to this service, the company acts in the relationship merely of an employment bureau, and its business is not a part of interstate or foreign commerce.

Pensions and Annuities—Due Process of Law, Impairment of Contract

Dodge, et al., vs. Board of Education of Chicago, et al. 82 Adv. Op. 77, 58 Sup. Ct. Rep. 98 [No. 5, Decided Nov. 8, 1937.]

Appeal from Illinois Supreme Court involving the Constitutional validity of the Illinois Act of July 12, 1935, (Laws, 1935, p. 1378) which reduced the amounts of "annuities" which by a prior act (the "Miller Law," Cahill's Ill. Rev. Stats., 1927, ch. 122, par. 269, as amended 1927), was made payable to public school teachers of Chicago. In an opinion by MR. JUSTICE ROBERTS, the Court, after an examination of both statutes, concluded that the State Court was not incorrect in holding that the language of and circumstances in which the earlier statute was adopted did not show a legislative intent to create a binding contract with the teachers. Therefore, the amendment reducing the annuity was not a violation of the "contract" or "Due Process" clauses, either as to teachers retired before the enactment of the law or as to those retired subsequent to its enactment.

Taxation—Corporate Reorganization—Taxable Gain—"Party to Reorganization" Defined

Groman vs. Commissioner of Internal Revenue, 82 Adv. Op. 96, 58 Sup. Ct. Rep. 108 [No. 21, Decided Nov. 8, 1937.]

Certiorari to review a judgment of the Circuit Court of Appeals for the Seventh Circuit involving the meaning and scope of the phrase "a party to a reorganization" as used in § 112 of the Revenue Act of 1928.

Here the petitioner and other shareholders of an Indiana corporation contracted with the Glidden Company for the merger and consolidation of the properties of their company with Glidden and with a new Ohio corporation. Under this agreement the shareholders assigned their shares to the Ohio company and received in return shares of that company, shares of Glidden stock, and cash. The Indiana corporation transferred its assets to the Ohio company and was dissolved. The question was whether that portion of the consideration consisting of shares of Glidden should be recognized in determining petitioner's taxable gain, or whether, under § 112(b) (3) of the Revenue Act which forbids recognition of gains or losses if pursuant to the reorganization plan, stock of a corporation which is a party to a reorganization is exchanged for stock of another corporation which also is a party to the reorganization, this gain was not taxable.

The Court in an opinion by MR. JUSTICE ROBERTS, held that the Glidden company did not fall within the explicit definition of "a party to the reorganization" set out in § 112(i) (2) of the Statute; nor within the ordinary connotation of that term, since, although a party to the agreement, it acted only as an agent in bringing about the reorganization, and was not actually a party to it. The opinion thus concludes that the shares of Glidden stock received by petitioner must be recognized as a basis for computation of taxable gain under the act.

MR. JUSTICE BLACK took no part in the case.

War Risk Insurance—Naval Enlistment; Parental Consent

United States vs. Williams, 82 Adv. Op. 61, 58 Sup. Ct. Rep. 81, [No. 11, Decided Nov. 8, 1937.]

Certiorari to review a decision of the Circuit Court of Appeals for the Seventh Circuit, involving the right of the mother of deceased to recover on a war risk insurance policy issued to her son at his request at the time of his enlistment in the Navy, when he was under 18 years of age, which he later terminated without the mother's knowledge. The son's enlistment had been accepted under 34 U.S.C., § 161, which requires parental consent for enlistment of minors between 14 and 18 years of age. Consent had been granted in this case upon condition that the insurance in question be carried by deceased during his term of enlistment. The mother contended that its subsequent cancellation was invalid in view of this conditional consent.

In an opinion by MR. JUSTICE BUTLER, the Court held that under the war powers Congress might require enlistment regardless of parental consent, that since the statute did not leave with the parents any right to condition consent to their son's enlistment, the qualification upon which consent in this case was given was not binding upon deceased, and that, therefore, the cancellation of the policy was valid, and the mother could not now recover upon it.

Classification of Criminal Punishment—Prison Breach

Pennsylvania ex rel, Sullivan, vs. Ashe, 82 Adv. Op. 58, 58 Sup. Ct. Rep. 59 [No. 25, Decided Nov. 8, 1937.]

Certiorari to review a holding of the Supreme Court of Pennsylvania involving the constitutionality of a Pennsylvania Statute (Act of March 31, 1860, P. L. 382, § 3) which classifies punishments to be imposed on convicts breaking out of the penitentiary by authorizing the court to imprison each for a period not exceeding his original sentence.

The Court, in an opinion by MR. JUSTICE BUTLER, held that although under the Pennsylvania Statute, terms of imprisonment for breaking the penitentiary may differ for different prison breakers because of the effect of different terms of the original sentences, that fact does not render the statute invalid, and that, in the light of the historical and practical recognition of the relationship between the gravity of the original offense and the punishment imposed for breach of prison by the offender, the classification must be sustained.

Taxation—"Games" Defined

White vs. Aronson, 82 Adv. Op. 74, 58 Sup. Ct. Rep. 95 [No. 20, Decided Nov. 8, 1937.]

Certiorari to review a judgment of the Circuit Court of Appeals for the first circuit, involving the taxability under § 609 of the Revenue Act of 1932 of "jig saw puzzles" manufactured and sold from June 21, 1932, to May 1, 1933.

The Court, in an opinion by MR. JUSTICE MCREYNOLDS, held that the section in question in using the word "games" in the list of items to be taxed, was referring only to articles used in games of contest, physical or mental; that both trade and usage recognized a definite distinction between games and puzzles, a distinction which Congress must be assumed to have known and that for these reasons the Circuit Court was correct in holding that "jig saw puzzles" are not taxable under the Act.

MR. JUSTICE STONE and MR. JUSTICE CARDOZO concurred in the result.

"OPEN FORUM" DISCUSSION OF PROPOSED RULES OF CIVIL PROCEDURE

Meeting Held under Auspices of Judicial Section at Kansas City Hears Addresses from Members of Advisory Committee Appointed by United States Supreme Court—Chairman Mitchell Tells of Problems Which Have Confronted Committee in Recent Months—Secretary Edgar B. Tolman Deals with History and Development of the Conformity Idea and the Cure for the Evils Resulting from That Experiment—Charles E. Clark, Reporter to Committee, Speaks of the More General Aspects of the Undertaking — Various Suggestions Made from the Floor and Noted for Consideration

THE second draft of "Proposed Rules for Civil Procedure for the Federal Courts" was the subject of an open forum discussion at the meeting of the Judicial Section at Kansas City on September 27. Preceding the discussion, statements were made as to the revised draft by Hon. William D. Mitchell, Chairman of the Advisory Committee on Rules for Civil Procedure; Major Edgar B. Tolman, Secretary of the Advisory Committee; and Dean Charles E. Clark, Reporter for the Committee. At the conclusion of Dean Clark's statement, Chairman Weygandt invited discussion.

The question of the extent to which the Conformity Act might be still effective in some respects under the new rules was raised by Mr. Morton John Barnard, of Illinois. Dean Clark replied that under these rules, in his opinion, there would be nothing left of the Conformity Act except where it is specifically provided, as for example, in the rule of attachment, which is that the State law applies. Except for such specific provisions, the effect of the rules, with the statutory provision that all laws inconsistent therewith would have no effect, would be to do away with the Conformity Act. In order to prevent being thrown back on the Act in case it should be found that there was still a place not covered by the rules, a provision had been made in Rule 85 to the effect that in such cases, the District Courts might regulate the practice in any manner not inconsistent with the rules.

This brought on a discussion as to the advisability of this provision with regard to District Courts. Mr. Edward J. Dimock, of New York, inquired whether there would be any harm in providing that, in cases not provided for by rule, the practice in equity, which is well known in the courts, should apply in every case which was formerly of equitable cognizance, and the practice at common law should apply in those cases which were formerly cognizable as common law. Chairman Mitchell replied at some length to this suggestion. He pointed out that the common law was a different thing in many different States and furnished no definite basis to go on. The tendency of such a provision for dealing with possible gaps in the rules would be, moreover, to revive the distinction in the matter of procedure between common law cases and equity cases, and he was afraid the Advisory Committee would not follow him on that point.

Mr. Clark added some comments on Mr. Dimock's suggestion, which had first been made at the Boston meeting. He said there were three alternatives: One, to reenact the old distinction to the extent suggested; another, to leave such cases to the operation of the Conformity Act; and the third, to leave it to the discretion of the judge. When this last alternative was considered in the light of the suggestion, which the American Bar Association has approved, that there be a Standing Advisory Committee, it did not seem to him that the procedure was going to get much out of line, or, if it did, that there would be any great difficulty in making the needed change.

Mr. John Ladner, of Oklahoma, recalled that the object and purpose of the act providing for the promulgation of these rules was to simplify and make uniform the procedure in the Federal Courts, and he inquired if it would not be better to leave the District Courts no rule-making power at all, or, if they were left such power, to place the approval of their rules in the United States Supreme Court alone. The latter alternative was suggested in reference to some observations which Dean Clark had made with regard to the proposed alternative rule, that the District Court rules should be approved by the Circuit Judges. Chairman Mitchell concluded this part of the discussion by restating the reasons for the adoption of the provision in Rule 85. He stated that his feeling was that it was merely a safeguard.

"If you can guarantee to us," he continued, "that we have covered everything in these rules that ought to be covered, I would vote to strike that out. But you can never tell when something unforeseen will come up. Why not have a stop-gap provision that allows the District Court, in case these rules are found to be incomplete, to make local rules to fill the gap? If the Supreme Court, under existing law, makes these rules, they have to be laid before Congress and lie there during the whole of a session before they are effective, thus giving Congress the power to reject them."

Mr. Fly, General Counsel of the Tennessee Valley Authority, made a number of suggestions. He pointed out that Subdivision (c) of Rule 83, dealing with the removal of cases from the State courts, called for an answer within the period allowed by law for answer by the State or within five days after the filing of the transcript of the record, which ever period is longer. He thought the period a little too short. He also criticized Rule 70, with its provision for temporary restraining orders and preliminary injunctions, stating that it had been his observation that there was a ten-

dency to abuse a provision for an injunction without notice of any kind. Referring to the same rule, he thought there might be some confusion in the provision for these injunctions if there was not a clause to save the rules set up by legislation providing for three-judge courts in certain important cases, as, for example, in the Act of August 24, 1937. General Mitchell asked Mr. Fly to be good enough to submit the suggestions dealing with this criticism in a definite draft for the committee's consideration.

Judge T. W. Davison, of Texas, brought up a point which he had raised in a previous discussion of the subject at a former meeting, regarding the provision in Rule 63 dealing with the subject of bond on appeal. He thought there should be a provision to the effect that the proposed bond shall be submitted to the judge who tries the case, except for good cause shown, and where presented to any other judge, either District or Circuit, opposing counsel should have reasonable notice of such presentation. Certain other members of the Section added comments on this proposal, after which the Open Forum came to an end.

Some of the Problems Confronting the Advisory Committee in Recent Months—Commencement of Actions—Effect of Findings of Fact in Cases Tried by Court Instead of Jury, Etc.

BY HON. WILLIAM D. MITCHELL
Chairman of the Advisory Committee

IN June, 1936, the Advisory Committee distributed to the bar a preliminary draft of proposed federal rules of civil procedure. In April of the present year we submitted to the Supreme Court and distributed to the bar a revised draft of the proposed rules. Although we have had no intimation from the Supreme Court on the subject, we assume that the Court will lay before the Congress at the opening of its next session in January, 1938, a draft of the rules which the Court decides to adopt. Meanwhile, the Advisory Committee will have a meeting around November first, at which it will prepare a supplementary report to the Court recommending such changes in the draft of April, 1937, as we may agree on, in the light of suggestions from the bench and bar and as the result of our own efforts to improve our draft. It thus appears that the next thirty days offer the last clear chance for members of the profession to submit to the Advisory Committee suggestions as to the form of the rules.

This meeting is not limited to approving or disapproving the rules as they stand in the printed draft. It is still open to you, both at this meeting and afterwards, to point out respects in which the draft is defective.

In its recent report to the Supreme Court, the Advisory Committee said:

"We doubt if any other effort for reform in judicial procedure has been accompanied by greater interest and cooperation on the part of the legal profession. All suggestions of committees and individuals were copied and distributed to each member of the Advisory Committee, were carefully digested and then considered at the meetings of the whole Committee."

That system will be followed in respect of suggestions of the bench and bar relating to the last published draft.

The preliminary draft of May, 1936, was what its name implies. The Advisory Committee well knew it was in many respects deficient in form and substance, but were satisfied that it would serve its purpose, which was to bring before the profession all pending proposals and arouse interest and discussion. It served that purpose well.

The draft of 1937, however, approaches the final form. During the year since its publication, the old draft had been revised again and again. This last draft is vastly superior. Nevertheless, it is open to improvement. Since it was printed in April last, I have kept a copy at my elbow and from time to time noted changes which I think should be made. My private copy contains in the margin proposed changes in thirty-five of the eighty-eight rules which I intend to present to the Advisory Committee at its next meeting. Other members of the Committee will have points which I have overlooked. Further suggestions are coming in from the profession. The supplementary report of the Advisory Committee to be made to the Supreme Court this fall should result in definite improvement in form and substance. Then the Supreme Court itself will make changes and improvements. On the whole, we may expect that when the rules are laid before Congress in January, they will embody the best that the composite efforts of the lawyers and judges of the country can produce.

A complete review of the proposed rules by me would be out of place here. It will be enough if I supplement my address before the assembly of this Association last year by mentioning a few of the problems that have confronted the Advisory Committee in recent months.

(1) *Commencement of Actions and Filing of Papers.*

In the preliminary draft we presented two alternative methods of beginning an action. One provided that to begin a suit it is necessary to file a complaint with the clerk of court, have summons issued under the seal

of the court and delivered to the marshal for service, and that all other pleadings and papers must be filed as well as served. The other method proposed was that permitted in many code states, which allows the lawyers to prepare the summons and complaint in their own offices and serve them without filing, and allows all papers to be withheld from the files until the point is reached at which some judicial action is asked for. All those members of the Advisory Committee who had practiced under the latter system favored it. Those members who had not practiced under this system were either opposed to it or doubtful. The reaction from the profession has been overwhelmingly in favor of the first system, which requires the complaint to be filed when the action is commenced. The Advisory Committee in its last draft has, therefore, adopted this system. Those of us who have practiced under the other yielded reluctantly. We know that the more informal system is more convenient, saves time and results in a saving of expense in cases which are settled or dismissed without judicial action, and we know from experience that the prediction of the opponents of this system of abuses and dire consequences that will flow from it are not borne out by actual experience in those states where this system is used. Nevertheless, it is after all largely a matter of speed and convenience, and as the bar of the country seems to prefer the more formal system, the Advisory Committee have recommended it to the Court.

A related question is whether service of summons may be made by any adult person not a party, or whether it shall be made by the marshal or his deputy. We have adhered to and recommended the latter system, but have inserted in Rule 4(c) a provision that special appointments of persons to serve process shall be made freely when substantial savings in travel fees will result. This will permit saving in time and expense where the marshal's office is distant from the point where service is to be made.

(2) *Commencement of Action; Statute of Limitations.*

Rule 3 reads:

"A civil action is commenced by filing a complaint with the court."

Rule 4(a) reads:

"Upon request of the plaintiff, at any time after the filing of the complaint, one or more summons shall issue against any defendant or defendants."

These rules have created a troublesome problem in connection with the statute of limitations. Ordinarily, the running of a statute of limitations is stopped by the commencement of an action. Our rules state that an action is commenced by filing a complaint, and furthermore that the summons is issued by the clerk only on request of the plaintiff, who may delay his request for weeks or months after the complaint is filed. The legal question is whether filing of a complaint under these rules constitutes the commencement of a suit within the meaning of state and federal statutes of limitations. Many state statutes by their terms or as construed by state courts provide that an action is commenced so as to stop the running of the statute only when the service is made or summons is delivered to an official for service. There is doubt as to whether the Supreme Court under a statute allowing it to make rules of practice and procedure may make a rule that the mere filing of the complaint stops the running of such a state statute of limitations. There is a difference of opinion among the members of the Advisory Committee as to whether this is a matter of practice and procedure or a matter of substantive law. We have suggested this difficulty in the note to the proposed rules and received some adverse comments from the bar for leaving this point unsettled. The difficulty is that we doubt if it can be surely settled by the rules. The principal trouble, I believe, arises because in Rule 4(a) we have provided that a summons shall not issue until requested by the plaintiff. That seems to be a relic of the late practice of requiring a plaintiff to file a praecipe for a summons. At the next meeting of the Advisory Committee my suggestion will be that we change Rule 4(a) so that when the complaint is filed it shall be the duty of the clerk, without any request, to forthwith issue the summons and deliver it for service to the marshal or other person appointed by the court to make service. That will prevent any delay between filing the complaint and delivery of process to an official for service, and will reduce delay between the filing and actual service. While the legal point which has been troubling us will still remain, as a practical matter there will be no case where the statute of limitations runs between the time the complaint is filed and the time the summons is issued and delivered to the marshal for service, and cases where the statute runs between the time of filing and the actual service will be rare.

(3) *Effect of Findings of Fact in Cases Tried by the Court Without a Jury.*

The present rule in the federal courts is that where a right to trial by jury exists but a jury is waived and the case is tried by the court, the findings of fact by the court have the effect of a verdict and may not be set aside on appeal if there is any substantial evidence to support them. On the other hand, in equity cases tried by a court, the findings may be reexamined on appeal and set aside if against the clear weight of the evidence. Now that we are attempting a uniform practice and procedure for actions at law and suits in equity, we should give to the findings of fact of a trial judge the same effect whether in a jury-waived case or a case formerly cognizable in equity. Otherwise we would be preserving the distinction between law and equity practice and require the appellate court in all cases to decide whether the case is one at law or in equity before determining the extent to which it may reexamine the findings of the trial judge. The Advisory Committee have unanimously favored the same system for both classes of cases. The question has been whether we would give to the findings of a trial judge in all classes of cases the effect of a verdict, or whether we would give to such findings the weight heretofore accorded to them in suits in equity. In the preliminary draft, in Rule 68, we provided that in all actions tried without a jury, the findings of the court "shall have the same effect as that heretofore given to findings in suits in equity." The Advisory Committee have adhered to this principle in the last draft, believing that it would be unfortunate in many classes of cases heretofore cognizable in equity to give to the findings of a trial judge the effect of a verdict. Nevertheless, our rule was open to criticism, as it left the lawyers to ascertain for themselves what weight has heretofore been given to findings in suits in equity. We concluded to state the rule, and as a result of examination of many decisions of the Supreme Court of the United States as to the weight given findings of a trial judge in equity cases, we have stated the rule as follows:

"Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity

of the trial court to judge of the credibility of the witnesses."

This correctly states the modern rule in equity cases, and while this differs from the rule followed on appeal in considering verdicts the difference in practice is not so great as to justify any further controversy on the point.

(4) *Method of Appeal.*

In the preliminary draft, in dealing with appeals to the Circuit Court of Appeals, we abolished the present practice of filing an application for leave to appeal and obtaining an order allowing an appeal followed by a citation, and substituted for it the simpler method prevailing in many states of serving a notice of appeal. On further consideration, the Committee concluded that to require service of a notice of appeal before the appeal became effective would cause trouble in cases where the attorney for the respondent had deceased or service could not be readily made for one reason or another, and we have improved and simplified the practice by providing in Rule 63 that the appeal is taken by merely filing a notice of appeal with the clerk of the district court. Further steps are required, such as giving of notice, filing bond, and so on, but none of them is jurisdictional.

The rule prescribing the method of making up the record on appeal to the Circuit Court of Appeals, now in Rule 65, has been completely revised and redrafted and, we think, simplified.

The bar generally seem to have approved of the proposal in the preliminary draft to abolish the requirement of narrative statements of the testimony of witnesses, and we have adhered to that in the last draft with one modification. The preliminary draft provided that narrative statements should not be used unless the parties stipulated for them. Our last draft allows an appellant to prepare and file a condensed statement in narrative form of all or part of the testimony, and the other party to the appeal may accept it or, if dissatisfied with it, may require testimony in question and answer form to be substituted in whole or in part, with the provision that if he rejects a fair narrative statement and insists on question and answer form without any real justification, the additional costs may be imposed upon him. This opens the way to narrative statements of those parts of the testimony which are not really in controversy, but does not require the parties to perform the laborious and expensive task of agreeing on a narrative statement where they are in controversy over it.

(5) *Special Provisions Applicable to the United States.*

In a large proportion of the litigation in the federal courts, the United States is a party. The Advisory Committee have been pressed by the legal staffs of many of the bureaus and agencies of the federal government to make special provisions in these rules applicable to cases in which the United States is a party. We have opposed the principle of making special provisions for the United States, on the ground that it destroys the uniformity of the rules, and on the further ground that we think the modern tendency where the government is a litigant is to require it to submit to the same rules of practice as are applied to its adversaries. Nevertheless, there are good reasons why some special provisions should be made for the United States. For example, we have given the United States sixty days instead of the usual twenty days in which to answer a complaint. Everyone familiar with government operations knows that, because of the size of its operations, it requires more time for an action to be brought to the attention of the government and reach the proper department for preparation of the information necessary for an answer, than private litigants require.

We made some other special provisions affecting the government. For example, in Rule 13 relating to counterclaim, it is provided that the rules "shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against the United States or an officer or agency thereof." The present law relating to counterclaims against the government, as we understand it, is:

1. That before proof of a set-off or credit against the United States will be received, the claim must have been first presented to and denied by the accounting officers of the government;

2. That a counterclaim against the government need not arise out of the same transaction as the one on which the government's suit is based;

3. That no affirmative judgment may be rendered against the United States on a counterclaim, or at least no such affirmative judgment may be rendered where the amount of the counterclaim is so large that the district court would not have jurisdiction to entertain it in an original suit against the government;

4. That as a mere set-off to diminish the amount of the government's recovery, there is no limitation on the amount that may be asserted as a basis of the counterclaim against the government.

Our rule leaves the law just where it is in this respect. There are some other respects in which special provisions apply to government litigation, but on the whole the rules provide for precisely the same practice in government cases as in private litigation, and we have only made exceptions in favor of the government where they are justified by experience and actual conditions.

(6) *Evidence.*

Although the Advisory Committee has been convinced that it should not undertake as part of the present rules to draft a code of rules of evidence for the federal courts, we have found it necessary to make a few provisions on the subject. Uniting actions at law and suits in equity under one form of practice and procedure raised the question as to whether the rules of evidence to be applied were those heretofore prevailing in actions at law or those applied in equity cases. We dealt with this in Rule 50 of the preliminary draft, which has been considerably revised in the new Rule 44. To avoid difficulties that have heretofore arisen under the conformity act, it is now provided that evidence shall be admitted if it is admissible under a statute of the United States or under the rules of evidence heretofore applied in suits in equity or under rules applied in the courts of the state in which the federal court is held, and if these rules differ, the one which favors reception of the evidence shall govern, and the competency of witnesses shall be determined in the same manner. There is a rule respecting the scope of cross-examination, and in deference to a suggestion by Col. Wigmore, we have adopted Rule 45, which is a condensation of a large number of statutory provisions for proof of official records.

(7) *Discovery.*

The provisions relating to discovery and examination before trial have been revised and are somewhat more conservative than those in the preliminary draft. We have stricken out entirely the old Rule 37 allow-

ing one party to demand of another a list of all the papers relevant to the cause. We have stricken out the provision that allowed the party to be examined to demand the appointment of a master to supervise the examination. On the other hand, we have fortified the provisions for protection against improper examinations and fishing expeditions. There are now adequate provisions allowing a party or a witness to apply to the court to limit the scope of the examination or to terminate it entirely if the privilege is being abused. At the last annual meeting of this Association, the Honorable Martin Conboy of New York delivered a very able address on the subject of discovery and examination before trial, which was carefully studied by the Advisory Committee in the preparation of the revised rules. At the same meeting Judge Finch of the Court of Appeals of the State of New York made an address deploring the extent to which strike suits and dishonest or blackmailing cases are instituted, and he suggested that the proposed rules would open the way still further for this sort of abuse. His illustrations were taken from conditions in the City of New York. His principal suggestion was that the law should punish the plaintiff who brings a strike suit by requiring him to pay not merely the ordinary costs, but all the expenses of the defendant, including reasonable counsel fees, if the defense is successful. The Advisory Committee believes that any substantial change in the present basis for taxing costs or disbursements is a matter for the Congress and not properly embodied in the proposed rules of practice of procedure. It may be that in large metropolitan areas like New York City where the conditions are admittedly bad and many dishonest actions are brought in the courts, the rules relating to discovery and examination before trial offer opportunities to lawyers of low ethical standards. As applied to the country as a whole, we think the rules relating to these subjects are in line with modern enlightened thought on the subject and will not be subjected to abuse. Uniform rules of practice and procedure must be drawn to meet conditions generally throughout the country and not special conditions in a few areas. Our suggestion is that in places like New York City the remedy is an improvement in the machinery for disbarring or disciplining lawyers guilty of misconduct.

(8) *Arrangement of Paragraphs.*

At the Boston meeting of the Association, Col. Wigmore criticized the preliminary draft, on the ground that we had referred to too many federal statutes and should have embodied all the federal statutes affecting practice and procedure in the rules. In deference to this suggestion we had a compilation made of all federal statutes in any way relating to matters of practice and procedure. A digest of these statutes made a formidable volume of several hundred pages. While theoretically it would be desirable to have all matters relating to practice and procedure taken out of the statutes and placed in the rules, the investigation thus made showed that it was impracticable, and if we want a condensed set of rules covering only essential matters we could not carry out Col. Wigmore's suggestion. We believe that the extent to which lawyers will be required under the proposed rules to refer to federal statutes is not so great as to be burdensome.

Col. Wigmore also pointed out that the rules as stated in the preliminary draft were not sufficiently subdivided. He suggested that we adopt the new decimal system for numbering the paragraphs. His criticism of the preliminary draft in this respect was sound. The Advisory Committee was unanimous in the conclusion that the decimal system of numbering was inappropriate for these rules, but we have subdivided the rules into many numbered or lettered paragraphs in a way to meet the substance of Col. Wigmore's criticism.

(9) *Pre-Trial Procedure.*

One proposal found in Rule 16 has received surprisingly little comment from the bar. This rule reads as follows:

"*Rule 16. Pre-Trial Procedure; Formulating Issues.* In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider.

(1) The simplification of the issues.

(2) The necessity or desirability of amendments to the pleadings.

(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof.

(4) The limitation of the number of expert witnesses.

(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury.

(6) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered shall control the subsequent course of the action. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or extend it to all actions."

This is a revision and enlargement of the matter contained in Rule 23 of the Preliminary draft. Under the English system this procedure is called "Summons for Directions" and is compulsory. Under the English rule this procedure must be instituted within seven days from the time the pleadings are closed. An informal hearing is then had at which counsel attend and at which such matters as sufficiency of the pleadings, bills of particulars, admissions of fact, discovery, interrogatories, inspection of documents, inspection of real or personal property, the mode by which particular facts may be proved, and other matters are considered and disposed of. Under the English system this practice has been effective in simplifying cases for trial.

A similar procedure has been tried in Boston, Detroit and Cleveland, and the judicial council of New York has recently recommended it for the urban centers in New York State. Experience has shown that where this procedure is in use it has, when intelligently administered, several good results.

1. The informal conference and discussion of the issues often results in settlement without trial.

2. It winnows out the chaff, simplifies the issues for trial and saves the time of the trial court.

3. Through this informal pre-trial conference, amendments to the pleadings, admissions of fact and simplification of issues are arrived at without requiring the parties to stand at arm's length and bombard each other with motions for amendments to the pleadings, for bills of particulars, demands for admissions of fact and formal examinations for purposes of discovery, and thus it saves time and expense to court and litigants and reduces congestion of trial calendars.

The English procedure is compulsory. You will note that our rule leaves it discretionary with each district court whether to put this procedure into effect. Our reason for leaving it discretionary is that we are not sure there is sufficient judicial force to administer it. We believe that in congested districts where there are several judges, it would reduce the court's labors in the end if one judge were assigned to handle such pre-trial procedure, but are not sure it would be feasible to burden the judges in some districts with the duty of conducting such conferences.

The compulsory system in England works well because their courts have standing masters to whom is assigned the duty of conducting the pre-trial proceedings. In the United States the district courts have standing masters, but their compensation is not paid out of the public treasury, and if their services are used their compensation must be paid by litigants and it would be out of line with American ideas to compel the litigants to pay the compensation of a master conducting pre-trial proceedings.

Of course, no rule can be adopted which assumes that Congress will appropriate money to pay masters for such service. The Judiciary Committee of the Senate is now considering further means to reduce congestion and simplify litigation in the federal district courts. In my judgment this committee should give consideration to the question whether such pre-trial procedure as our Rule 16 contemplates should not be made a regular and compulsory part of procedure in the federal courts through the appropriation of sufficient public funds to provide for modest salaries to standing masters appointed by the courts to handle the work. Lawyers can be found who are competent and impartial, but not very successful as business-getters, to serve as standing masters and supplement their professional income by such service. The annual compensation of such standing masters could be varied in different districts, depending on the volume of the work and whether the service of a standing master is a full-time or part-time job. Salaries ranging from $2,500 to $7,500 per annum would be adequate. To provide an additional district judge in a congested district means the appointment of a judge with life tenure at an annual salary of $10,000 per annum, and involves additional expense for additional court-rooms, additional bailiffs and additional clerical force. The standing master system applying the pre-trial procedure would not necessarily be a permanent charge on the public treasury. Experience has shown that this procedure tends greatly to relieve congestion in the busy districts. As an alternative to the appointment of additional district judges in congested districts, it deserves consideration. The English system has been successful, and here is an instance where we may well profit from the experience of our friends across the sea. The Congress might well select the few districts in which court business is now congested and appropriate money for the compensation of standing masters in those districts to conduct the pre-trial procedure outlined in our Rule 16, and thus give the system a trial.

There are many other points arising under the latest draft which have interested the Advisory Committee and doubtless would interest you. Possibly the other speakers on the program will refer to some of them. The members of the Committee hope for suggestions from the bar upon this final draft. It has been a source of regret to us that we could not take the time to answer every suggestion that has been made and explain our reasons for rejecting those which we have not accepted. At least every member of the bar who has sent in a suggestion may rest assured that it has been considered individually and collectively by the members of the Advisory Committee. The work of the present Advisory Committee is now drawing to a close. It has been laborious but interesting, and all of us are grateful for the opportunity to participate with the members of the profession throughout the country in this common effort to bring about a fundamental improvement in the machinery of justice.

There was a time early this summer when some of us lost our zest for this work. We were not sure that by the time the rules were ready there would be any federal courts worthy of the name, so why spend our time trying to build up the courts when those high in authority were tearing them down. Happily, that fear has temporarily abated. I would like to say it has dissipated. But how can we say that when we know that those who favor displacing the courts in our constitutional system are as determined as ever to bring that about if opportunity occurs? As matters stand, our work will be worth while.

We hope and believe that the new rules will demonstrate the wisdom of entrusting the matter of practice and procedure to the courts, and that the new federal rules will constitute a model for similar systems in the states, thus approaching as near as may be uniformity of practice and procedure throughout the courts of the country.

NEW SERVICE TO MEMBERS

AS part of its program for increased service the American Bar Association has made arrangements to furnish to its members copies of Opinions of the Supreme Court, at a cost of $1.00 for each opinion. Copies of opinions will be sent by air mail within twenty-four hours after the opinion is handed down, which means that they should be received anywhere in the United States on the second day. Requests for opinions may be made prior to the time the decision is announced. All requests should be addressed to the American Bar Association, 1152 National Press Building, Washington, D. C., and should be accompanied by a check payable to the order of the Association for $1.00 for each opinion requested. If it is desired that the opinion be sent special delivery, 10c should be added to the remittance.

The Origin of the Conformity Idea, Its Development, the Failure of the Experiment, the Evils Which Resulted Therefrom, and the Cure for Those Evils

BY EDGAR B. TOLMAN
Secretary of the Advisory Committee

THE Advisory Committee appointed by the Supreme Court of the United States to assist the court in the preparation of federal rules of civil procedure has now been working on that task for more than two years. The performance of that duty is approaching its conclusion and it is hoped that the court may promulgate the rules in time for the Attorney General to present them to Congress at the beginning of its session in January, 1938.

The Advisory Committee has been aided by the cooperation of a very large number of the members of the American bench and bar. Local committees have been appointed in every federal district except where the circuit judges have thought it better to appoint committees for the judicial circuit. Many committees appointed by state and city bar associations and many individual members of the bar, in response to the general invitation extended by the Advisory Committee, have also examined the drafts of the proposed rules and submitted suggestions to the committee. The rules have also been discussed at the meetings of the state and local bar associations and at meetings of the various judicial conferences, notably at those of the Fourth Judicial Circuit. The teaching branch of the profession and the law journals have also cooperated. The extent of this cooperation may be seen by an examination of the bibliography of articles on federal rules of civil procedure, prepared by Dean Clark, Mr. Joseph M. Friedman and Mr. Leland L. Tolman, which appears as Schedule "D" of this year's report of the American Bar Association's Committee on Jurisprudence and Law Reform, printed at page 109 of the Advance Program.[1]

The discussion of the rules at the sessions of the "Open Forum" conducted at Boston last year under the auspices of the Judicial Section, the National Conference of Judicial Councils and the American Bar Association Committee on Jurisprudence and Law Reform, was of special value.[2] We have the right to expect additional values from the present conference.

No such large scale cooperation between the bench and bar for the improvement of the methods of court procedure, has ever been seen before in this country.

The Advisory Committee has found this cooperation of great value, and has given intent consideration to all the suggestions submitted. Many of them have been adopted and are incorporated into the latest draft. The revision of April, 1937, is not to be considered merely as the proposal of the committee but as a consensus of the considered opinion of the profession. The time for further criticism and suggestions has not passed, although the dead line date is approaching. Everything that comes in before the November meeting of the committee will be given careful consideration. There is reason to expect that further improvement will be accomplished by the continued cooperation of the bench and bar.

The principal changes in the preliminary draft which are incorporated into the 1937 draft, are shown in an article by Mr. Edward H. Hammond, a member of the Advisory Committee's legal staff, published in the July number of the American Bar Association Journal. This comparison of the 1936 and 1937 drafts should be helpful in the consideration of the draft now before you, particularly to those of you who have studied the Preliminary Draft.

Our distinguished and indefatigable chairman, Mr. Mitchell, has just spoken to you on some of the important features of the proposed rules and of some of the committee's more important problems. What he has said in those matters needs no supplement. My remarks will be confined to one other important topic which has always occupied a large place in the long struggle for improved methods of procedure in the federal courts. I refer to the acts of Congress which provide that actions at law in the courts of the United States be there conducted in conformity with the law of the state in which the Federal Court is held.

The origin of the conformity idea, the history of its development, the failure of that experiment, the evils which resulted therefrom, and the cure for those evils, will therefore be next discussed.

I
THE ORIGIN OF THE CONFORMITY IDEA

When the National government came into existence, and it became necessary because of the dual sovereignty to establish courts of the United States as distinguished from those of the states, judicial procedure was at once committed to judicial control.

An act to establish the Judicial Courts of the United States (frequently called the "First Judiciary Act" 1 Stat. 73-93, in force September 24, 1789) contained, among other provisions, the following:

> "Sec. 17. . . . That all the said courts of the United States shall have power . . . to make and establish all necessary rules for the orderly conducting business in said courts, provided such rules are not repugnant to the laws of the United States."

By the Act of August 23, 1842, 5 Stat. 516-518 the power of the Supreme Court to make rules for all the other courts of the United States was stated in very broad terms. Section 6 of that act reads as follows:

> "That the Supreme Court shall have full power and authority, from time to time, to prescribe, and regulate, and alter, the forms of writs and other process . . . and the forms and modes of framing and filing libels, bills, answers, and other proceedings and pleadings, in suits at common law or in admiralty and in equity pending in the

1. Will also appear 62 A.B.A. Report, 1937.
2. 61 A.B.A. Report, 86 ff. and 423, 1936.

said courts, . . . and generally to regulate the whole practice of said courts, so as to prevent delays, and to promote brevity . . . and to abolish all unnecessary costs and expenses in any suit therein."

When the Supreme Court took the first step in the exercise of the rule-making power, it made the following declaration:

"The Attorney General having moved for information, relative to the system of practice by which Attorneys and Counsellors of this court shall regulate themselves, and of the place in which rules in causes here depending shall be obtained, THE CHIEF JUSTICE, at a subsequent day, stated that THE COURT considers the practice of the courts of *King's Bench* and *Chancery* in *England*, as affording outlines for the practice of this court; and that they will, from time to time, make such alterations therein, as circumstances may render necessary." (2 Dall, 411; 1 L. ed. 437.)

The court made from time to time thereafter necessary alterations in the practice in chancery and admiralty. The equity rules promulgated in 1822 met the necessities of that day. They were amended from time to time and the revision of 1912 was a notable achievement in modernization. The admiralty rules have also kept step with the necessities of that branch of the practice but no general rules were promulgated by the Supreme Court for the practice in cases at law.

Having completely and satisfactorily discharged the duty cast upon it in regard to the regulation of the practice in chancery and admiralty, the question naturally suggests itself, why did the court fail to perform the same duty in regard to the regulation of the practice at law? This question is of no immediate moment and possesses only an historical and academic interest but it is in part explained by the language of Chief Justice Marshall in *Wayman v. Southard*, 10 Wheat 1, 6 L. ed. 253, 258, which casts light upon the then existing situation. He said: (p. 263)

"Congress, at the introduction of the present government, was placed in a peculiar situation. A judicial system was to be prepared, not for a consolidated people, but for distinct societies, already possessing distinct systems, and accustomed to laws, which, though originating in the same great principles, had been variously modified."

And Mr. Justice Swayne in *Indianapolis & St. L. R. R. Co.* v. *Horst*, 93 U. S. 291; 23 L. ed. 899, offered another reason which operated in favor of the conformity idea when he said: (p. 901)

" . . . The section in question had its origin in the code enactments of many of the states and was intended to relieve the legal profession from the burden of studying and of practicing under the two distinct and different systems of the law of procedure in the same locality, one obtaining in the courts of the United States and the other in the courts of the state."

The chancery and admiralty practice had not been materially modified and it may be inferred that the changes which the various state legislatures had introduced into court procedure, had been made principally in proceedings at law, and that therefore the experiment of conformity to state practice was confined to actions at law.

The first experiment with the idea of conformity was embodied in the first Process act of September 29, 1789, (1 Stat. 93), which as its title implied dealt primarily with the forms of writs and process. Then followed the "Permanent Process Act" of May 8, 1792, (1 Stat. 275) which also declared for conformity in the "forms and modes of proceeding." That conformity, however, was made subject to "alteration by the respective courts or by rules which the Supreme Court of the United States might think proper to prescribe for the other courts of the United States," and so remained until 1872.

It is deemed unnecessary here to set out or to consider in detail the "conformity" provisions of various other acts, such as 4 Stat. 278, May 19, 1828, and 5 Stat. 499, August 1, 1842. They were tentative measures seeking to deal with special phases of conformity. There seems to have been a recognition of the danger of providing for conformity with future and necessarily unknown and unknowable state legislation. Accordingly the earlier acts provided for conformity as of the date of the act. New states, however, came into the Union and it became necessary to make a new date of conformity in 1828.

These fears of evils which *might* result from future state legislation, were out-weighed by the realization of the immediate evil of an alliance with state procedural law which no longer was in force in the state of its origin. Congress still sought the objective of uniformity. Stimulated by the adoption of the "Field Code" by an increasing number of states, it continued the effort to find means by which in each state there should be but one system of procedure in the state and federal courts. In the hope of accomplishing that impossible project, Congress finally went the whole way and adopted the very provision which many leading members of the earlier Congresses had pointed out in earnest debate and the bench and bar had feared. The act by which it was attempted to accomplish this result, and the one now in force, is that of June 1, 1872, 17 Stat. 196, the material provision of which reads as follows:

"Sec. 5. That the practice, pleadings, and forms and modes of proceeding in other than equity and admiralty causes in the circuit and district courts of the United States shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceedings existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding. . . ."

It should be noted that this act negatived the exercise of the rule-making power which had been declared by the earlier acts.

It is now in order to consider the complete failure of this act to accomplish the result intended.

II
DIFFICULTIES WITH THE CONFORMITY IDEA

The faults inherent in the general conformity act did not manifest themselves to any serious extent, so long as the state practice continued to follow the English pattern, but when the states changed their practice by legislative action, and it was found that the changes were not compatible with the fundamental principles of Federal jurisprudence, complete conformity became impossible.

Since the Conformity act was adopted for the purpose of bringing about uniformity of procedure in state and federal tribunals and since the extent to which the courts have declared conformity to be impossible, is not everywhere realized, it seems worth while to consider as briefly as may be, a few of the cases in which the Supreme Court of the United States has declared that conformity with state procedure conflicts with the fundamental principles of federal jurisprudence and with specific Federal statutes, and to that extent is not binding on the Federal courts.

1. *State legislation for the relief of debtors.*

In the early days of the Republic and particularly

after the War of 1812, the Nation passed through one of its severest financial depressions and the states passed various laws for the relief of those who could not meet their obligations.

(a) In 1825 a statute of Kentucky attempted to give relief to delinquent debtors by providing that judgments might be paid in state bank notes (then heavily depreciated). The Kentucky law also provided that the defendant might obtain a postponement of the enforcement of the execution for two years by replevin and bond. Suit was brought in a Federal court in Kentucky to recover a debt and it was contended by the debtor that he was entitled to those privileges because of the Conformity act. Chief Justice Marshall, in *Wayman v. Southard,* 10 Wheat, 1; 6 L. ed. 203, held that neither the Conformity act nor the Rules of Decision act required the United States courts to recognize the limitations which Kentucky had made for the enforcement of state process, that the United States courts had complete control of federal judicial process, and that under the laws then in force federal writs were not amenable to limitations created by state statutes.

(b) By another statute of Kentucky the sale of property taken under execution, for less than three-fourths of its appraised value, was prohibited. The applicability of that statute, under the Conformity act, came before the Supreme Court on a division of opinion of the judges of the Circuit Court of the United States for the District of Kentucky, in *Bank of the United States v. Halsted,* 10 Wheat, 51; 6 L. ed. 264. This statute also was held not to be binding on the Federal government, on the authority of *Wayman v. Southard, supra.*

(c) An Illinois statute for the relief of its debtor class, passed in 1841, prohibited the sale of a debtor's property under execution before it had been appraised, and then at not less than two-thirds of the valuation. This statute also was invoked under the Conformity act, but the Supreme Court in *McCracken v. Hayward,* 2 Howard 608; 11 L. ed. 397, held that the Conformity act could not be recognized for the creation of limitations on the enforcement of an execution of the Federal courts.

2. *State legislation regarding service of summons and time for appearance.*

(a) A statute of Colorado provided for the method of service of process and the time within which the defendant must answer. That statute was incorporated into a rule of the United States District Court for the District of Colorado. The statute was subsequently amended so that it conflicted with the former statute and with the rule of the District Court. Suit was brought in the District Court and served in accordance with the rule of that court but not in accordance with the amended state statute. Defendant challenged the jurisdiction of the court for lack of a proper writ of summons and claimed that the judgment was void for failure to conform with the provisions of the state statute. The case was brought to the Supreme Court of the United States and Justice Shiras in *Shepard v. Adams,* 168 U. S. 618; 42 L. ed. 602, held that service in compliance with the federal rule was valid and sufficient and that the Conformity act did not compel the court to amend its rule or to comply with successive changes in the state statute.

(b) A statute of Texas provided for service on an agent of a non-resident. The plaintiff in an action brought in a Federal Court in that state sought the benefit of that statute, under the Conformity act. There were Federal statutes defining the territorial jurisdiction of the courts and the service of process, with which the Texas statute was in conflict. The case was brought for review to the Supreme Court of the United States, and is reported as *Southern Pacific Company v. Denton,* 146 U. S., 202; 36 L. ed. 942, in which Mr. Justice Gray said: (p. 945)

"But the jurisdiction of the Circuit Courts of the United States has been defined and limited by the acts of Congress, and can be neither restricted nor enlarged by the statutes of a state. (Citing many cases) . . . And whenever Congress has legislated upon any matter of practice, and prescribed a definite rule for the government of its own courts, it is to that extent exclusive of the legislation of the state upon the same matter."

(c) The law of Texas also provided that a special appearance of a defendant to question jurisdiction or proper service of process becomes a general appearance to the next term of court. In a suit brought in the Federal Court in Texas, federal jurisdiction was challenged by plea in abatement and motion to quash. A demurrer to the plea was sustained whereupon the defendant filed a demurrer to the complaint, a general denial, and other pleas to the merits. There was trial, verdict, and judgment for the plaintiff. On appeal the question arose whether the defendant's objection to jurisdiction could be considered, in view of the fact that pleas to the merits has been filed. Mr. Justice Jackson in *Mexican Central R. Co. v. Pinkney,* 149 U. S. 194; 37 L. ed. 699, at p. 704, declared that the Conformity act was not binding on the Federal Courts when state statutes conflicted with acts of Congress respecting the jurisdiction of the Federal courts, and quoted with approval Mr. Justice Gray's statement, above set forth.

3. *State statutes concerning evidence.*

(a) An Illinois statute disqualified a witness interested in a suit, from testifying as to conversations held with a decedent. By a Federal statute this disqualification ran only to the *parties to the action* and did not include interested witnesses who were not parties.

In *Potter v. Third National Bank of Chicago,* 102 U. S. 163; 26 L. ed. 111, the court refused to follow the state statute.

(b) The same statute was again invoked under the Conformity act in a case removed from a state to a Federal court in which the evidence of the witness has been excluded by the state court before the case had been removed to the Federal Court. On this point Mr. Justice Wood said in *King v. Worthington,* 104 U. S. 44; 26 L. ed. 652: (p. 655)

"The Federal Court was bound to deal with the case according to the rules of practice and evidence prescribed by the Acts of Congress. If the case is properly removed, the party removing it is entitled to any advantage which the practice and jurisprudence of the Federal Court gives him."

(c) A statute of Indiana authorized the surgical examination of a plaintiff in an action for personal injuries. Such an action was brought in the Federal Court for the District of Indiana. Defendant moved the court for an order against the plaintiff to submit to a surgical examination in the presence of her own surgeon and her attorneys. The motion was overruled and error was assigned. On appeal Mr. Justice Gray in *Union Pacific Railway Co. v. Botsford,* 141 U. S. 250; 35 L. ed. 734, said:

"But this is not a question which is governed by the law or practice of the state in which the trial is had. It depends upon the power of the national courts under the

Constitution and laws of the United States. The Constitution, in the Seventh Amendment, declares that . . . trial by jury shall be preserved. Congress has enacted that "the mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided,' and has then made special provisions for taking depositions."

and the judgment of the trial court was affirmed.

(d) By the statutes of Missouri the deposition of a witness taken *de bene esse* was admissible in evidence, subject to the right of the adverse party to place the witness on the stand and cross-examine him, if present. The Federal Court in Missouri held that this provision of the law of Missouri was in conflict with Federal statutes as construed by the Supreme Court of the United States which permitted depositions *de bene esse* to be received in evidence only if the witness was still unavailable because of sickness, age or absence. The Supreme Court in *Whitford v. County of Clark,* 119 U. S. 522; 30 L. ed. 500, affirmed the lower court and refused to sanction conformity with the law of the state.

(e) The statute of New York permitted preliminary examination of parties before the trial. A suit was brought in the state court and the defendant was ordered to appear for examination before the trial. He refused to appear and was adjudged in contempt. He removed the case to the Federal Court and that court ordered the witness to appear for examination, declared him in contempt for failure to do so and ordered his arrest. He sued out a writ of habeas corpus challenging the right of the Federal Court to compel him to submit to an examination before trial. The Supreme Court *In re Fisk,* 113 U. S. 713; 28 L. ed. 117, held that the Federal statute expressly declared how and when depositions should be taken and evidence received, that there was no provision for examination of a party before trial, and that the Conformity act did not justify the action of the Federal Court because in conflict with established Federal law.

4. *State legislation attempting to curtail the exercise of judicial power in the charge of the judge to the jury.*

(a) An Illinois Practice act provided that the court should instruct the jury only as to the law and that no instructions should be given or modified except in writing. In a case tried in Illinois, in the Circuit Court of the United States, the judge declined to follow the statute. The action of the trial judge in charging the jury and commenting on the evidence according to the course of the common law, was challenged on appeal as a breach of the Conformity act, but Mr. Justice Swayne in *Nudd v. Burrows,* 91 U. S. 441; 23 L. ed. 286, said:

"If the proposition of the counsel for the plaintiff in error be correct, the powers of the judge as defined by the common law, were largely trenched upon. . . . The personal conduct and administration of the judge in the discharge of his separate functions is, in our judgment, neither practice, pleading nor a form nor mode of proceeding *within the meaning of those terms as found in the context.* . . . There are certain powers inherent in the judicial office. How far the legislative department of the government can impair them, or dictate the manner of their exercise, are interesting questions, but it is unnecessary in this case to consider them." (Italics supplied.)

It should be observed that Mr. Justice Swayne did not declare that the conduct of the judge in charging the jury was not procedural. He said that it was not practice or procedure within the meaning of those terms as found in the context. The context was the Conformity act. A reading of the opinion clearly discloses the reluctance of the court to hold the Illinois statute unconstitutional if that question could be avoided. That question was put on one side because the decision could properly be rested on the construction of the Conformity act. Subsequent decisions which cited *Nudd v. Burrows* make this increasingly clear.

(b) The statutes of Georgia provided for written instructions and prohibited comment on the evidence. An action for personal injuries was tried in a Federal court in that state. The trial court refused to follow the Georgia statute. When the case was reviewed in the Supreme Court of the United States, Mr. Justice Gray in *Vicksburg & M. R. R. Co. v. Putnam,* 118 U. S. 545; 30 L. ed. 257, said: (p. 258)

"The powers of the courts of the United States in this respect are not controlled by the statutes of the state forbidding judges to express an opinion on the facts."

(c) The Constitution of Arkansas declared that judges should not charge juries with respect to matters of fact and should reduce their charge to writing on the request of either party. In a case tried before a jury in a circuit court of the United States in Arkansas, the judge instructed the jury orally and declined to comply with the provisions of the Constitution of Arkansas. His action was the basis of exception by the appellant. Chief Justice Waite in *St. L. I. M. & S. R. Co. v. Wickers,* 122 U. S. 360; 30 L. ed. 161, said:

"A State Constitution cannot, any more than a state statute, prohibit the judges of the courts of the United States from charging juries with regard to matters of fact."

(d) The statutes of Nebraska required the court to instruct the jury in writing unless the parties waived the benefit of that provision. The case was brought for review to the Supreme Court of the United States where it was claimed that the Conformity act made that provision of the Nebraska law obligatory on the judge. In *City of Lincoln v. Power,* 151 U. S. 436; 38 L. ed. 224, Mr. Justice Shiras said: (p. 227)

"But we are of opinion that the judges of the Federal courts are not controlled in their manner of charging juries by the state regulations. Such part of their judicial action is not within the meaning of Section 914." (The Conformity act.)

(e) In *Patton v. United States,* 281 U. S. 276; 74 L. ed. 854, Mr. Justice Sutherland stated that one of the essentials of trial by jury as at common law was, (p. 858, 859)

"That the trial should be in the presence of and under the superintendence of a judge having power to instruct them as to the law and advise them in respect to the fact; . . . These common law elements are embodied in the constitutional provisions above quoted, and are beyond the authority of the legislative department to destroy or abridge. . . . "

He then quoted with approval the language of Mr. Justice Brewer in *American Publishing Co. v. Fisher,* 166 U. S. 464, 468:

"Whatever may be true as to legislation which changes any mere details of a jury trial, it is clear that a statute which destroys this substantial and essential feature thereof, is one abriding the right."

and Mr. Justice Sutherland continued: (p. 859)

"Any such attempt is vain and ineffectual, whatever form it may take."

Some suggestions have been made to the committee that the rules should follow the methods in vogue in many of the states where the judge is forbidden to comment on the evidence and is required to reduce his

charge to writing and read it to the jury. Because of the repeated declarations of the Supreme Court above referred to, the committee has been compelled to the belief that power to make any material change in trial by jury as at common law would run counter to the Seventh Amendment.

The foregoing are by no means all the cases in which the Supreme Court of the United States has refused to follow the Conformity act, and has declared that various state procedural statutes cannot be followed in the Federal courts. The very much larger number of instances reported in the decisions of the Circuit Court of Appeals and the District Courts of the United States, cannot now be considered on account of the limitation of time and space, but enough has been said to show that uniformity of method in the trial of cases in the state and federal courts, has utterly failed of accomplishment.

One who desires to pursue this question further is referred to the report of the Committee on Uniform Federal Procedure, 1929, 54 A.B.A. Reports, p. 514 at 523, and to the two articles entitled "Federal Process and State Legislation" by Charles Warren, published in XVI Virginia Law Review, beginning on page 421. A continuation of that article appears on page 546. The distinguished author of the History of the Supreme Court of the United States, comments on all the cases above referred to and with his usual thoroughness cites many others and supplements the discussion of the cases by the debates in the Constitutional Convention and in Congress.

The object of the conformity idea was to make it unnecessary for a lawyer who knew the state practice, to learn another system of practice when his case was removed to or arose in a Federal court. This object was not attained. On the contrary the lawyer had to learn in addition to the practice of his own state, all the Federal statutes dealing with procedure, and all of the exceptions to the rule of conformity. These exceptions arose from time to time as disparities presented themselves in particular cases. The ordinary practitioner therefore was largely excluded from participation in Federal litigation and Federal practice was monopolized by experts.

Of course it was and is desirable that state and Federal practice should be as nearly alike as possible, but there are special reasons for a single system of Federal procedure uniform throughout the United States.

When our Federal judicial system was devised and first put into operation, it was usually sufficient for the lawyer and the judge to know and to employ in the Federal courts the practice of his own state. When the pioneer judges and lawyers rode circuit, they seldom crossed state lines and there was very little need to know the law of procedure of a sister state. Now, with the departure of the "horse and buggy age," the railroad, the automobile and the airplane have tremendously increased the radius of individual effort. There are several states in each circuit and the practice of many lawyers extends into several circuits. Under the Conformity act they must know the procedure in all those circuits, and in each of those states.

Moreover, the organization of the circuits and of the Federal judiciary system, as proposed by Chief Justice Taft and enacted by Congress, resulted in the creation of a mobile judicial force. The circuit judge must know the practice of all the states in his own circuit, and since he may be assigned to any other circuit. he should be reasonably familiar with the law of practice and procedure throughout the United States. In like manner also the district judge may be called to sit in states other than his own. The exchange of district judges is now a commonplace. Chicago judges sit in New York and New York judges in Chicago.

These considerations, arising from the modern development of wider spheres of individual effort, demand the substitution of uniformity in place of an outmoded and rejected conformity. The failure arose from the wholesale adoption of the changing procedural statutes of the several states. The impossibility of that kind of wholesale conformity was soon demonstrated and the courts declined to observe the Conformity act whenever it appeared that local procedure was in conflict with Federal law, hampered Federal jurisdiction or tended to limit the power of the Federal Court to administer justice in accordance with the fundamental principles of Federal jurisprudence.

Conformity, therefore, became an evil because of its indiscriminate and unstable character. The cure for this evil is a single uniform system of Federal procedure, in which shall be incorporated the best features of modern state procedure. In attempting to provide such a remedy, the effort has been to make the proposed rules so clear and simple that every practitioner will be as well able to try his cases in any Federal court, as in the courts of his own state.

A single uniform system of procedure under which the lawyer of every locality may practice with equal facility in the national and state courts, is greatly to be desired. After more than a century of failure the long deferred hope for the accomplishment of that ideal seems to be possible of realization. The proposed rules, which thousands of the bar and hundreds of the bench have helped to frame, with the improvements which you and others may still suggest and those which the Court will make, will undoubtedly be the nearest possible approach to an ideal system. In several states, the power of the court to regulate the methods of judicial procedure, has been declared by legislative act. In other states, where that power has not been so recognized, professional opinion and court decisions are showing a decided swing toward the belief that the Constitutional grant of judicial power carries with it an implied Constitutional grant of the right to regulate the methods to be employed in exercising that power. If the state Supreme Courts exercise that power by the adoption of procedural rules in harmony with those promulgated by the Supreme Court of the United States, the long journey will have reached its destination, the long struggle will have accomplished its objective, and the pathway of Justice will be made straight.

The New Federal Rules of Civil Procedure: The Last Phase—Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure

BY CHARLES E. CLARK
Reporter of the Advisory Committee

THE task of drafting the new federal rules of civil procedure is now so nearly completed that some attempt to assay results seems in order. Obviously it is not for a member of the drafting committee to attempt a prophecy as to the probable success of the proposed draft. Something, however, may properly be said on other and more general aspects of the undertaking. Whatever may be the fate of the rules themselves, it seems clear that much has already been accomplished in the way of a practical demonstration of court rule making in operation. It has been shown that a vast adventure in cooperative intellectual endeavor by the bar of the entire country can be brought to the point of producing a coherent and clear-cut system of procedure, for approval or disapproval, as the event may disclose. It has been possible for the lawyers to organize and press through to statutory enactment authorization for an important law reform; for a committee from the profession of diverse experience and background to reach unanimity of belief as to the best practice code to be offered to the profession; for the lawyers all over the United States to spend time, which in total value, computed at professional rates, must reach a staggering amount, in judicious and meticulous scrutiny and criticism of the product; and finally, as now seems indicated, for the bar and bench as a whole to accept the result in a fine spirit of desire to make it a truly effective instrument for the administration of justice.

In view of the wide distribution which the printed draft of the proposed rules has had, a general description of them is no longer necessary. It may be worth while, however, to review briefly the underlying philosophy embodied in some of the basic provisions of the new procedure. I refer particularly to the generality of allegation and the free joinder of claims and parties which are to be permitted. Naturally I cannot speak for the other individual members of the Committee in trying to make that philosophy articulate, but since all pleading reform of modern times—without exception so far as I know—has followed the same course, and it is now a commonplace of scholars and practitioners, I am perhaps not unduly rash in making the attempt. I emphasize the fact that this has been the universal trend of Anglo-Saxon procedural reform, because, while it seems generally to have been expected as the natural course for the Committee to follow in its work of drafting the new rules, there have recently been a few dissents criticizing the course as academic and stating with apparent assurance that it cannot work out successfully or satisfactorily in actual practice. I hope, however, the profession will realize what a heavy burden of proof the Committee would have assumed had it thus gone against the whole trend of modern procedural reform. Such a burden, in my humble judgment at least, could not possibly have been sustained in the light of that trend and the practical experience pursuant to it.

Since the time when towards the end of the eighteenth century the long struggle for procedural reform commenced in England, the movement away from special pleadings and from emphasis on technical precision of allegation has been steady. True, the first definite step of reform—the Hilary rules of 1834—was in the opposite direction. This particular reform was committed to the hands of specialists who wanted more rather than less pleading. Consequently never has pleading been more technical and abstruse or justice more often denied for errors of form than during the next ten years. The decisions reported by Messrs. Meeson and Welby may still be read with profit as a solemn warning of how not to reform pleading. Both the absurdities and the harshness of the results were pilloried for all time in Sergeant Hayes' famous dialogue in Hades, called "Crogate's Case" after the notorious relic of barbarism reported under that name. You will recall that Baron Surrebutter, a transparent disguise for Baron Parke, relates to Crogate how a series of rules of pleading have been framed, which have given a "truly magnificent development to this admirable system" so "that nearly half the cases coming recently before the Court have been decided upon points of pleading," and that to Crogate's astonished inquiry, "But pray, how do the suitors like this sort of justice?" there is the classic reply, "Mr. Crogate, that consideration has never occurred to me, nor do I conceive that laws ought to be adapted to suit the tastes and capacities of the ignorant." So great was the outcry, however, that the rules were soon repealed. Soon thereafter came the wave of code pleading reform, first in this country beginning in 1848 in New York, and then in England. One main objective of this system, as is well known, was the statement of allegations in short and simple form, so simple in fact that a layman could understand them. Such has been the course of procedural development, reiterated in the new codes. The theory and the practice have been well described by the Chief Justice for the Supreme Court of the United States in the case of *Munn* v. *Decker* (257 Sup. Ct. 675) this spring, a decision approving the short bill of complaint, so called, in equity suits for patent infringement. And Mr. Justice Stone for the Court in *Stone* v. *White* (ibid. 851), also decided this spring, carefully states the philosophy of the common counts, an extremely useful and practical form of generalized pleading in debt claims, unjustly condemned by some text writers.

Again, the movement for extensive joinder of parties and claims received its first impetus in equity practice, where the chancellor loved to do complete justice and fully to settle in one action all the issues in dis-

pute between the litigating parties. The early code pleading substantially adopted the equity rules of joinder, but even these rules proved too restrictive, and various devices, such as the consolidation of actions, the bringing in of third parties, the intervention of persons interested, and the expansion of the action of interpleader led to the broadening of the unit of suit. Finally the revised English procedure came to the point of authorizing comparatively unlimited joinder of claims and of all parties, so long as they were interested in a common question of law or fact. This English rule has now been adopted in the new systems of New Jersey, New York, California, and Illinois, and is the rule recommended in our Committee's report. The New York experience is particularly illuminating, for there, in the Civil Practice Act of 1921, the English rules as to joinder of parties were adopted, but the old restricted rule of joinder of causes was retained. It was soon discovered that these two rules were at variance with one another, and like freedom of joinder of claims was provided for by the 1936 amendment to the Act.

Analysis of the situation will show, it is thought, how wholly natural is this development. Common law pleading in all its various aspects and details is to be explained in the light of the history which brought it about; not in terms of some inherent or fundamental necessity. Thus, the distinction between indebitatus assumpsit and debt was not due to any inherent distinction between the claims presented by the respective actions, but merely to the desire of litigants to secure the more just trial by jury, rather than the old wager of law. It was the law growing and developing, not the reflection of things eternal and unchanging. Common law pleading, therefore, came to be a curious mixture of the simple and the complex. It worked to the extent it did work because there was permitted within the confines of the forms of action a wide flexibility of claim as well as an extensive generality of allegation. It often did not work because the formal obstructions of the forms of action and of special pleading where that was required got in the way of efficient and impartial justice. These obstructions were swept away by the code reform, which also brought about the union of law and equity. Nevertheless under the best code practice and in some of the non-code states, the good points of the older pleading have been preserved in the simple and uncomplicated form of allegation and defense. One may turn, for example, to the statutory forms of pleading, appearing in the practice act of Massachusetts, to find both ancient and modern pleading at its best.

Now the ideal of the common law system—that the parties should alternatively state their case in detail and with precision until at length there was disclosed a single matter upon which they were at issue—was impossible of fulfillment, for in practice the parties were not willing to confine themselves, and in justice could not properly be confined, to one sole contention. The system broke down as early as the Statute of Queen Anne, which permitted the defendant to file several pleas to one declaration. It was impossible of fulfillment because a poor pleader was not skilful enough, and a good pleader was too skilful, to comply with its requirement. It called for action contrary to the habits and desires of the actors. It could therefore be secured only under the lash of some severe penalty which the courts were unwilling to apply. A pleader will willingly state his case so far as is necessary to achieve some results he desires. In the old days he would state it sufficiently to show that it came within a recognized form of action. Now he will state it in such a way as to get a jury trial, an injunction, or other kindred interlocutory relief or action; he will state it sufficiently to secure its proper routing through the trial process as he wishes it to go; he will state it so to found a final and lasting judgment upon it. He will not state it in such detail as to prove his opponent's case. Strategy will warn him that it is not his function to show his hand more than he is required before trial, and experience will teach him that he may come to grief by not realizing in advance all that the evidence may show in his favor when it is produced. Hence he will carefully avoid such admissions on his part, as he can easily either by pleading generally or by pleading with such a wealth of details that he is prepared to take advantage of any possible turn the case may take. Except for an occasional Baron Surrebutter, the courts will not force him to do otherwise, for at best it takes an expenditure of time and energy, better devoted to the actual work of trial and decision, to force such beautifying of the pleadings, and at worst it means the sacrifice of the client for a mistake of his lawyer.

Experience has shown, therefore, that we cannot expect the proof of the case to be made through the pleadings, and that such proof is really not their function. We can expect a general statement distinguishing the case from all others, so that the manner and form of trial and remedy expected are clear, and so that a permanent judgment will result. That, by tradition and training, the lawyer as pleader does rather naturally. Beyond that, wasted time of courts and even sacrifice of individual litigants have not served to produce any discoverable results of value either to the science of pleading or the practical administration of justice. Moreover, through the weapons of discovery and summary judgment we have developed new devices, with more appropriate penalties to aid in matters of *proof*, and do not need to force the pleadings to their less appropriate function. Discovery enables a party in advance of trial to find out whatever he needs to know of the proof for the purpose of trial. Summary judgment is really a shortened form of trial itself. There is certainly no longer reason to force the pleadings to take the place of proof, and to require other ideas than simple concise statements, free from the requirement of technical detail.

On the matter of joinder, too, it is desirable that all matters in dispute between litigants be brought to issue and settled as quickly and directly as possible. In general this can be best done in a single action. Such course saves time and expense for the litigants and for the courts; it represents the difference between a single and permanent surgical operation as compared to chronic physicking. Even from the standpoint of the court records, of simplifying and reducing the formal and permanent history of litigation, there is a gain. The only objection which can be made is the possible confusion of court or jury. This, be it noted, is always the final argument against pleading simplification. It is incapable of substantiation. What is confusion, when does it occur, and does it actually obstruct justice? The answers are in the realm of speculation. Certain very definite things can be said, however. These are in short that only an infinitely small number of cases of even claimed confusion can be found on a busy court schedule, that in these few cases the court has ample power to avoid all difficulty by ordering a separate trial, and that the evidence of the reported cases is all against the probability of harm to litigants in this respect. Of the cases brought,

only a very few go to judgment; of these only a small number represent actual trials, and an astonishingly small percentage (about 3⅓% of all cases) the jury trials. Of these, in turn, only a few will present problems of joinder. The objection seems clearly to call for a restricted rule which is undesirable in probably ninety-nine out of a hundred cases, for fear of error in the hundredth case, notwithstanding the court's discretionary power to care for that case specially. Lawyers are familiar with many instances where under the old procedure, even when cases are officially brought as separate units, they are actually tried together by agreement and to the satisfaction of all. A recent case is reported in New Jersey where six different claims for automobile injury resulting in six different verdicts were tried by agreement without apparent difficulty. A famous case under the New York procedure shows 193 plaintiffs suing together for damages caused by representations made in a claimed fraudulent stock prospectus. The distinguished court of that state held that no prejudice was shown. There is no apparent reason why 193 different actions would have promoted justice or accomplished more than did this simple case.

In other words, here, as elsewhere in matters of procedure, the fears with which newer procedural devices are viewed in prospect are not supported by the actual results. It should be noted, too, that the basic theory of the union of law and equity already adopted by the Supreme Court as the guiding principle to be followed by the Committee in drafting the new rules renders necessary the adoption of provisions along these general lines. There is little reason for uniting law and equity if the benefits of such union are to be lost by requiring the bringing of distinct and different suits for slightly differing forms of claim.

An extremely interesting and important question arises concerning the effect of that provision of the enabling statute which states that after promulgation of the rules "all laws in conflict therewith shall be of no further force or effect." This is a unique provision well designed to accomplish speedily the complete elimination of the former principle of conformity and of all parts of the old Conformity Act. A similar provision is in operation, with apparent complete success, in Wisconsin, although in that state the superseding rules did not bring about a change as extensive as is contemplated here. An additional question is presented, too, by the federal statute, inasmuch as this provision occurs in Section 1 of the Act, that section which provides for the promulgation of rules in civil actions at law. It would be indeed an anomalous situation if under the combined procedure a rule affecting law actions would operate to nullify inconsistent statutes, while it had no such force so far as it applied to equitable claims. There are many statutory provisions governing such matters as amendment, to take an example, which are in the spirit of the new rules, but which can only form a part of a general procedural scheme, if redrawn as they have been in the draft. The rules carry forward the reform of those statutes; they are not inimical to each other. But slightly differing expressions might lead to hopelessly confusing results if each applied to parts of one single civil action. Elsewhere (in the Harvard Law Review for June, 1936) I have stated reasons why I believe this repealing provision must be held to apply to the combined procedure visualized by the new rules, and not merely to claims at law alone.

Even if this question is satisfactorily answered, there arise other serious problems as to the meaning and operation of the statute. It is our general judgment from the language of the rule that no express statement of repeal will be effective, but that the rendering of statutes of no effect is only by virtue of the adoption of a conflicting rule and to the extent of the conflict. That would mean that the effect of a rule in this regard is a matter of interpretation by the courts after the rule has become operative. Consequently the statements appearing in the notes to the various rules in the Committee's report are, presumably, only the Committee's conclusion as to the interpretations the courts should or are likely to make. Just what attitude the Supreme Court will take as to the notes remains to be seen. If the Court should order them published merely as information suuplied by the Committee, this question of interpretation is certainly then open. It is not clear that it would not be open even if the Court went so far as to accept the Committee's notes as its own report. It should be noted that, when a note states that a rule continues a statute, or incorporates its substance, this is but a way of expressing the Committee's judgment that the rule does, to the extent stated, reenact the statute. It would still be true that the statute is thought to be superseded, as no longer necessary. The rule must govern, whatever be its effect and whether it does or does not reenact the statute.

It would appear, therefore, highly probable that problems of interpretation of difficulty and importance as to the extent to which statutory provisions are still in effect, will arise for some time. This is not said by way of criticism of this provision of the statute. Indeed, it is difficult to see how without it conformity could be so quickly, so thoroughly, and so definitely eliminated. It is said in order that this problem may be understood, and further in order that thought may be taken as to ways and means of reducing the difficulties of adjustment. One way might be a statutory enactment eliminating from the Judicial Code all statutes substantially covered by the rules. Such an act is hardly appropriate until the rules have actually taken effect and the statutes have been thereby made ineffective. Such a statute would require some time for its preparation, since it should be prepared with the greatest care. It may be that this is a task to which a standing advisory committee, should one be appointed, might address itself at an early stage of its activities.

Temple Dinner Horns

On the first day of Hilary term the Inner Temple revived the old custom of blowing the horn to summon their members to dinner in the Hall. This custom was discontinued by the Inner Temple fifty years ago, but it has been observed in the Middle Temple from ancient times. The earliest known reference to the blowing of the horn is to be found in the Records of the Inner Temple for the year 1621, and is as follows: "That the horne may blowe for dinner before eleaven of the clocke and before sixe for supper and that as sone as there are three messes in the Hall then the Buttlers to serve out". The use of a horn for this purpose has been explained on the ground that its note could be heard by Young Templars on the other side of the Thames who were out coursing hares.

The Inner Temple Horn which, although out of use for so long, has been carefully preserved, is nearly three feet long and bears a silver band with the date 1786 stamped on it. The one now in use at the Middle Temple is of modern origin. The old one, through constant handling had worn so thin and been repaired so often that its deep sonorous note had changed to a series of painful noises.

JUNIOR BAR CONFERENCE HOLDS MOST SUCCESSFUL MEETING

By Paul F. Hannah
Secretary of Junior Bar Conference

LED by Weston Vernon, Jr., of New York, and with an ambitious program of activities tucked under its belt, the Junior Bar Conference is now heading into its fourth year of existence after the biggest and what many regard as the most successful meeting since the Conference was created in Milwaukee in 1934.

The 1937-8 program forged at Kansas City during the last week of September by the more than five hundred Conference members in attendance will center about improving the relations of the bar and public, and judicial and professional standards. The chief feature of the activities will be a greatly expanded public information campaign, designed to make available to citizens' groups through Conference speakers data on subjects within the peculiar knowledge of lawyers.

The Conference also pledged itself, during its three days of meetings, to promote legal aid work; to raise, if possible, the standards of bar admission; to study substitutes for the direct election of judges; to foster further coordination of the organized bar; and to urge the establishment of a Law and Justice Day throughout the United States.

When Chairman Stecher, at exactly two o'clock Sunday afternoon, September 26th, banged the redwood gavel, presented to the Conference by the Los Angeles Junior Barristers in 1935, to open the Fourth Annual Meeting, more than three hundred members were present.

Robert W. Pharr, to whom the gavel was turned over, then introduced President Stinchfield, who thanked the Conference in behalf of the American Bar Association, not only for its work of the last year, but for all that it had done and for the attitude it had taken since its organization. He referred particularly to its part in the Court controversy, and added:

"It would, however, also be unfair to you if I gave the impression that it is only for your work with reference to the Supreme Court that you are entitled to our thanks. You have been willing to accept any job that tended toward the increase of coordination, anything that evidenced the possibility of bettering the profession, anything that tended to place us in a better light in the estimation of the public."

President Stinchfield concluded by elaborating the somewhat unusual thesis that there is no temperamental and fundamental difference between age and youth. "We shall get very much closer together, we shall understand each other better," he said, "if we cease laying emphasis on ages and put more emphasis upon individuals. We need to determine whether this man, whatever his age, is conservative, is liberal or is reckless. Young men should be constantly recognized on committees, should be given a part of the work—not because they are young, but because some of you have capacity and, when you have it, recognition should be given to you."

Frank Brockus of Kansas City, Chairman of the Committee on Arrangements for the Conference, delivered the address of welcome. "In Los Angeles, the Conference had the beauties of climate and of scenery; in Boston, there were the historic places surrounding that old city. We cannot offer you such things here, but we can offer you the finest quality of hospitality", he said. Long before the sessions were over, every member of the Conference realized that the quality promised had been understated.

The response to Mr. Brockus was given by Walter L. Brown of Huntington, West Virginia, former Chairman.

The keynote of the meetings was struck by Chairman Stecher, when, after reviewing the work the Conference had done during the year, he said:

"The Supreme Court issue is now past although we cannot be certain that history will not indulge in repetition. The great issue, so far as the Bar is concerned, still remains. That issue involves the attitude and opinion of the general public concerning the Bar. . .

"Our proper function to me seems clear—a program designed to improve the relations between the public and the Bar. That program must of course have some announced objective other than the mere restoration of public confidence. I can think of no subject more fitted to the needs of the hour than 'The Improvement of the Administration of Justice'. It embraces the Supreme Court, our entire judicial system and it embraces as well the important subjects of unauthorized and unethical practice of the law, subjects in which young lawyers should be intensely interested."

Following the Chairman's report, the reports of the Rules and Elections Committees were presented by their respective Chairmen, Harold Bredell of Indianapolis and A. Pratt Kesler, of Salt Lake City. Grant Cooper of Los Angeles then gave his report as Chairman of the Activities Committee.

Mr. Cooper outlined the activities his Committee had planned for the coming year, and particularly dwelt upon the machinery for the National Public Information program. Lively debate over the inclusion in the program of promotion of "Law and Justice Day" in the United States closed the first session.

At the second session, held at 9:30 Tuesday morning, September 28th, the proponents of Law and Justice Day, who evidently had gone to bed earlier the night before than the opponents, succeeded in securing approval of the entire Activities Committee report before the echoes of the opening gavel had hardly died away.

The first resolution presented by Robert M. Clark of Topeka, Kansas, Chairman of the Resolutions Committee, which had held well attended and lively open hearings all day Monday, was one of thanks to the Kansas City hosts. This resolution was unanimously adopted by a standing vote.

Without a dissenting voice, the two hundred and fifty members present adopted the following resolution which the Committee had favorably reported:

"Be it Resolved, That the Junior Bar Conference of the American Bar Association reaffirms its conviction

that it is essential to the preservation of our form of Government that the Courts of the United States remain independent of the will of the Congress or of the Executive with power to decide upon the constitutionality of legislative and executive acts; and that the Conference is opposed to any attempt to impair the independence of such Courts or to deprive them of jurisdiction over constitutional questions:

"BE IT FURTHER RESOLVED, That the Executive Council of the Conference is hereby authorized and directed on behalf of the Conference to oppose any attempt to impair the independence of the Federal Courts or to deprive them of jurisdiction over constitutional questions."

The Conference followed the Resolutions Committee in turning down a plan to create a committee to study ways and means of prevailing upon the motion pictures and the theaters to portray attorneys in a different light. The Committee was also upheld by approval of a resolution on the plan of Governmental reorganization advanced by the President's Committee on Administrative Management. The Conference urged the American Bar Association to make a careful study of the proposal to abolish the independent agencies of Government.

The sharpest fight came on Seneca Anderson's resolution urging legislation requiring candidates for judicial office to file statements under oath naming the secret organizations to which they have belonged or do belong. The resolution called also for provisions that wilful falsification in such statements should constitute cause for impeachment or removal from office.

After more than an hour of high-powered oratory, parliamentary wrangles, motions and counter-motions, the resolution, as drafted, was defeated and a special committee was created to redraft the resolution and report during the year to the Executive Council.

The voting for officers followed immediately after the report of Stanley Ford, Chairman of the Nominating Committee, and the nominations from the floor. This year, a ballot box was set up by the Elections Committee, the polls were open for two hours, and the results were announced at breakfast, Wednesday morning. (Officers of the Conference are listed in the Section Directory in this issue).

Frank Brockus and his Committee on Arrangements, aided and abetted by every younger and older lawyer in Kansas City, were chiefly responsible for the ample gayety which balanced the seriousness of the program. No better entertainment program could have been planned. Sunday night, the lady members of the bar and the ladies accompanying the Conference members were entertained at the Junior League Club, while the men were regaled at the Kansas Citian at what was termed in the program as an "Informal Reception". The two groups joined forces Tuesday night at a dinner dance at the Mission Hills Country Club that all agreed was one of the best parties the Conference ever had.

The Conference left the city "where the East joins hands with the West" with a feeling of accomplishment and definite purpose, incredibly tired, and warmed with the fine glow of the friendliness and kindness of the local bar.

ANNOUNCEMENT OF 1938 ESSAY CONTEST CONDUCTED BY AMERICAN BAR ASSOCIATION PURSUANT TO TERMS OF BEQUEST OF JUDGE ERSKINE M. ROSS, DECEASED

INFORMATION FOR CONTESTANTS

Subject to be discussed:

"The Extent to Which Fact-Finding Boards Should be Bound by Rules of Evidence."

Time when essay must be submitted:

On or before March 1, 1938.

Amount of Prize:

Three Thousand Dollars.

Eligibility:

Contest will be open to all members of the Association in good standing, except previous winners, officers, members of the Board of Governors, and employees of the Association.

No essay entered will be accepted unless written especially for this contest and not previously published. Each entryman will be required to assign to the Association all right, title and interest in the essay submitted. Any essay not desired for further use by the Association will, upon request of its author, be returned and the interest of the Association therein waived.

An essay shall be restricted to five thousand words, including quoted matter and citations in the text. Footnotes may be used and will not be counted as a part of the essay, but excessive documentation in footnotes may be penalized by the judges of the contest.

Each contestant must agree to abide by the decision of the Board of Governors in the selection of the winner and on any question raised.

Procedure:

Anyone wishing to enter the contest shall communicate promptly with Olive G. Ricker, Executive Secretary, American Bar Association, 1140 North Dearborn Street, Chicago, Illinois, who will furnish:

(a) entry number in quadruplicate, in a container sealed prior to receipt of any application, so that the number therein may be known only to the recipient;

(b) large envelope, addressed, for mailing essay;

(c) small envelope, addressed, for mailing one of the entry numbers together with printed form to be filled in by the contestant to show name and address; which will thereafter not be opened until the winning essay has been selected and its identifying number announced.

Essay is to be submitted in triplicate, typewritten, double spaced (footnotes, however, may be single spaced), on one side of plain white paper, letter size (8½x11), and mailed as first class matter, without folding, in the envelope furnished for that purpose, on or before March 1, 1938. Total number of words of the text on each page shall be typed on bottom of each page of at least one copy. For identification, one of the entry numbers furnished for that purpose shall be affixed to each of the three copies of the essay. Any other identifying mark on the essay or on the envelope containing the same, or on the envelope containing the fourth number and the name and address of the contestant, will disqualify the entry.

The fourth entry number shall be attached to a printed form on which the entryman shall type his full name and address, sign the agreement printed thereon, and then seal for mailing in the envelope furnished for that purpose. That envelope, when prepared for mailing, will be held by the entryman until March 2. 1938. and then mailed. It is not to be mailed in or with the envelope which contains the copies of the essay, which must be postmarked not later than March 1, 1938.

No additional information will be given by the Executive Secretary. Any questions raised will be submitted to the Board of Governors for consideration.

CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

Among Recent Books

CIVILIZATION AND THE GROWTH OF LAW, by William A. Robson. 1935. New York: The Macmillan Company. Pp. 354.—The author is a Reader in Administrative Law in the University of London and has a long record in legal scholarship and authorship. He is a member of the Executive Committee of the Fabian Society and is known in this country from his lecture tours of our universities in 1922-23 and in 1932. He was visiting professor at the University of Chicago in 1933.

The sub-title is "A Study of the Relations Between Men's Ideas about the Universe and the Institutions of Law and Government," and, as he begins at the beginning and goes on to Whitehead, Einstein, Eddington and Jerome Frank, he covers a lot of territory. He takes us all the way from savage isolation to organic social life and when we arrive at the latter point we cannot feel complacent with the results of the efforts of our ancestors or ourselves. It is interesting to have him quote Mr. Sidney Webb (now Lord Passfield) as late as 1923 concerning the "inevitability of gradualness" as opposed to the decision of Sir James Jeans "Gradualness is driven out of physics, and discontinuity takes its place." His text is so pithy and well ordered that one should read and ponder on it duly, or else avoid the adventure. If one chooses to neglect this inquiry he will miss a great chance to get another point of view of the present and the possible paths that our "Mistress, the law" tends to tread in the future.

MITCHELL D. FOLLANSBEE

Chicago, Ill.

Lectures on the Constitution and the Supreme Court, by W. Erskine Williams. 1937. Dallas, Texas: Wilkinson Printing Company. 97 pages—Lectures delivered to the Law Department of the Soochow University, in Shanghai, China, in 1924, and to the School of Law of Southern Methodist University, in Dallas, Texas, in 1932, by W. Erskine Williams, of Fort Worth, Texas, have been brought together in a little volume which wins a place in the rapidly increasing bibliography of the Constitution and the Supreme Court. From the point of view of a practising lawyer, this member of the American Bar Association made a clear and acceptable exposition of his concept of the fundamentals of government according to law. He quoted freely from James Grafton Rogers and the late James M. Beck, and no doubt charmed, if not puzzled, Oriental listeners with a graphic portrayal of "The North American Lawyer and His Code of Ethics."

* *

The Constitution and What It Means Today, by Edward S. Corwin. 1937. Fifth Revised Edition. Princeton: Princeton University Press. 193 pages—If, as Senator Burke and others have predicted, the next onslaught on the independence and functioning of the Supreme Court of the United States will take the form of an attempt to curtail its powers of judicial review rather than to dilute its membership, Professor Corwin's revision of his familiar volume will be often referred to in that controversy. His preface to the new edition propounds the question: 'Has this [judicial review] come to be an outworn practice which the American democracy is now prepared to slough off in whole or in part; or does it still answer to a felt need of the American people?" Equally pointed is his further question "Do they [the decisions of April 12, 1937] import that the Court has permanently given over the attempt to set up the residual powers of the States as an independent limitation on the delegated, supreme powers of the National Government?" Faithful to his well-known views, the author pronounces that "certainly a consummation devoutly to be wished," but adds that "on none of these matters is prophesy ventured. * * * We can only wait and see."

The main purpose of this fifth revised edition is stated by Professor Corwin to be "to cover the New Deal cases." The general plan and scope of the previous editions are followed; the fourth edition (1930) and its much-discussed preface are particularly affirmed; but a great many pages of the text have been re-written, "in order to project them [the New Deal cases] against an explanatory background." The "discretionary nature of the power which the Supreme Court frequently exercises in the review of legislation" and the "essentially political character of much of the work of the Court in the constitutional field" are again the ascendant theme, with the effort to demonstrate that constitutional law since 1890, particularly under the "due process" clauses, has hinged upon standards of what is "fair play" and what is "reasonable" and "just" as the action of government—standards which are "judge-made," with precedents playing their part, however deeply such standards may be in the *mores* or "fitness of things."

Vigorous debate as to the soundness and the consequences of Professor Corwin's views has taken place elsewhere, and will not be renewed in this column because of the appearance of this fifth edition. He has placed the recent decisions of the Court in the familiar setting of his views; they will be read with interest, irrespective of agreement with his interpretations. It is to be regretted that in this revision he has not seen fit to complete some of the quotations which have been criticised for incompleteness. For example: The statement attributed to the present Chief Justice of the United States when he was Governor of New York:

"We live under a Constitution, but the Constitution is what the judges say it is"—

It would have been easy—and fair—to give the whole

sentence (as Ernest Angell does in his *Supreme Court Primer*)—

"and the judiciary is the safeguard of our liberty and of our property under the Constitution."

* *

Supreme Court Primer: The A B C's of the Court, the Constitution, and the Current Issues, Set Forth in Simple, Non-Legal Language for the Layman, by Ernest Angell. 1937. New York: Reynal & Hitchcock, Inc. 157 pages—Although described as a "primer" in "non-legal language for the layman," this brochure uses and quotes freely the terminology of the recent constitutional debates and analyzes the decisions around which controversy has centered. The author, who is Regional Administrator of the Securities and Exchange Commission for the New York area, has made a lucid and compact assembly of informative data as to the great issues, and the publishers have given an attractive format. Although his selection of materials may lead some to suppose that this "primer" was put together to support the President's proposals of February 5, 1937, a fairer inference may be that Mr. Angell sought to show sympathetically the long-range back-ground of the proposals and to "scale down" the significance of their particular mechanics. His selection and apt use of quotations from those who held opposing views are more than ordinarily skilful and are withal fair. It may justly be said that this volume has been written in the *spirit* in which the American Bar Association engaged in the late controversy; namely, that the facts and the opposing arguments should be fully and fairly presented before the people, to the end that an informed public opinion might decide the outcome, as it did.

WILLIAM L. RANSOM.

New York City.

The Mentally Ill in America, by Albert Deutsch. 1937. New York: Doubleday Doran & Co. Pp. 530 + xvii.—Mental disease constitutes one of the major problems of social welfare and of public health. The mere statement that in 1934 there were over 403,000 of these patients in about 525 hospitals in this country, at an annual estimated cost of over 200 million dollars, is probably enough to justify that assertion. Add the fact that of the persons over 15 years of age in the United States one out of 22 will be at some time a patient in a mental hospital, and it is patent to even the most complacent that the problem is one of vital importance to every citizen.

Mr. Deutsch, an experienced social historian, here presents a story which should be read by every intelligent man and woman. It is a dramatic, but thoroughly documented and accurate, account of the history of the treatment (all too often brutal and motivated by the grossest superstition) accorded to the mentally deranged since Colonial times; of the cagings, jailings, whippings, exorcisings, and even hangings; of the "farming out" to the highest bidder; of the efforts of a few enlightened souls like Benjamin Rush and Dorothea L. Dix toward humane care, with the development of the modern state hospital and the state care system out of the local "asylums"; and the progress, under the inspiration of men like Clifford Beers, toward a public understanding of the nature of mental disease and an interest in its prevention.

Because of the fact that most of the mentally ill are detained under legal process of some sort, and because of the bearing of what the law denominates as "insanity" on various legal procedures, the legal profession has a vital interest in the topic. Every judge and every lawyer could read with profit Mr. Deutsch's chapters on "Insanity and the Criminal Law" and "Our Commitment Laws." The development of the concept of "insanity" as affecting responsibility is traced, and the present day procedures relating to psychiatric expert testimony, "limited responsibility," and the disposition of defendants acquitted by reason of insanity are discussed, together with suggestions for improvement. It is of interest that the resolutions adopted by the American Bar Association in 1929 relative to psychiatric services in criminal courts are quoted at length (pp. 415-416) as one of the "principal reform proposals"; they are that indeed, and it is to be regretted that the progressive principles there laid down have not been more widely put into practice.

The rather backward state of the laws relating to the commitment of the civil "insane," at least in a number of jurisdictions, is clearly indicated (ch. 19), with a brief historical review, and the baneful results of jury trials of "alleged lunatics" are emphasized. Fortunately, there appears to be a growing trend toward commitment without judicial process, especially by means of voluntary admission and temporary care (p 439). Much, however, remains to be done in making hospital care as readily attainable for the mental patient as for the sufferer from appendicitis or pneumonia.

Finally, Mr. Deutsch points out the far more hopeful attitude toward mental disease than existed even in the century just past, and the growing emphasis on treatment and on prevention. The importance of relieving the overcrowding now prevalent in too many hospitals, of attracting and holding trained personnel by means of a merit system divorced from partisan politics, and of the further development of research into the causation, cure and prevention of the great social plague of mental disorder are emphasized.

The author has rendered a signal service to a large group of the afflicted who cannot well speak for themselves and who still, in spite of the advances of civilization, are all too little understood by the public.

WINFRED OVERHOLSER

Saint Elizabeth's Hospital,
Washington, D. C.

Prison Life Is Different, by James A. Johnston. 1937. Boston: Houghton Mifflin Company. Pp. v, 337—James A. Johnston, the author of this book, is the Warden of the United States Penitentiary at Alcatraz Island. But he is also a lawyer and that is what makes his book of particular interest to the members of the legal profession, who have been called upon to perform many services, public and private. If any lawyer is inclined to wonder what he might do if the governor of his state should, without warning, ask him to serve as warden of the state penitentiary let him read this book. There he will learn how one of his fellows answered the question, and the experiences which came to him as a result. During his professional life Mr. Johnston has been also the vice-president of a large bank and trust company, the holder of several important public offices in the State of California, including the chairmanship of the State Board of Control, and was the warden, successively, of the two large California state penitentiaries at Folsom and San Quentin. These experiences have made him much more than a legalist and, as might well be expected, the book is

written in popular style, little emphasis being placed upon the legal phases of penitentiary management.

That Governor Hiram Johnson expected a change in policy from Warden James A. Johnston is evidenced clearly enough in the brief dialogue set out in the introductory paragraph:

"'But, Governor,' I told him, 'I don't know anything about prisons.'"

"'So much the better,' he said. 'You won't have anything to forget.'"

Johnston, the neophyte warden, began by abolishing corporal punishment—the methods of which, previously existing, he relates in rather gruesome detail—in spite of the fact that he was welcomed to his new work by an outbreak which is well described in the chapter title "Hell Breaks Loose." He then orients the reader in his problem by cameos of particularly vicious and difficult criminal types and the ingenious methods of escape which they devised; of filthy quarters, of twisted mentalities. There follow chapters on pioneering work in the classification of criminals; the individualization of treatment, including the treatment of insanity, physical ailments, dental trouble and drug addiction; prison industries and highway construction by honor prisoners.

A very effective chapter describes the relation between ignorance and criminality and the efforts which were made through education to prepare the convict for his day of release; others describe the working of the parole system and the indeterminate sentence.

A concise history of the famous Mooney case, with interesting personal impressions concerning the convict, are contained in a chapter devoted to Mooney and other dynamiters. Women prisoners, capital punishment, the conviction of the innocent, and several other subjects fill a number of additional chapters; and the book concludes with a discussion of methods of crime prevention.

This is a telling picture of a world concerning which supposedly good citizens, including most lawyers, prefer to close their eyes and their minds.

JUSTIN MILLER

Washington, D. C.

The Book of the States. Vol. II. Book One. 1937. Chicago: Council of State Governments. Pp. 400.—This is a second edition of a volume published each two years by the Council of State Governments, which was organized for the encouragement of cooperation among state governments. Part 1 of the volume (pages 1-146), entitled "Intergovernmental Cooperation," is devoted to the work of the Council and of its various sections and affiliated organizations, among which are the Interstate Commission on Crime, the American Legislators' Association, the Governors' Conference, the National Association of Secretaries of State, and the National Association of Attorneys General. This part of the volume is of interest as presenting brief and up-to-date accounts of various activities in which effective results can only be obtained through cooperation among the states. Part 2 of the volume (pages 155-393), entitled "A Handbook of the States," presents, in a convenient form, information about the organization and personnel of the several state governments.

The book, as a whole, reflects the present activities, and the greater future possibilities, of cooperation among the states, through sponsorship by an efficient national organization. Such cooperation is necessary for the preservation of efficient state governments, and for the avoidance of undue centralization under the national government.

* *

Workmen's Compensation Law in Louisiana: A Case Study. By Marian Mayer, A. M. 1937. Baton Rouge: Louisiana State University Press. Pp. 253—One is somewhat misled by the sub-title of this book. The term "case study" implies to the reader a study of the effect of the law in specific cases of disabled employees. The book is, on the contrary, limited to a discussion of the judicial decisions construing and applying the workmen's compensation act of Louisiana. The author's introduction says that "The present study is an attempt to analyze the interpretations of the Louisiana act for the past twenty-two years" (page 7). And in conclusion the author says that: "The foregoing pages are no more than an exposition from the practitioner's point of view of the rules of law governing workmen's compensation" (Page 135). The task so assumed has been well performed, and the volume should be useful to those concerned with the application of the workmen's compensation law of Louisiana. In her concluding chapter the author properly refers to the article by Gladys Vonau on "Administration of Workmen's Compensation Cases in Louisiana," published in 7 Tulane Law Review, 217 (1933), and reemphasizes the defects of court administration of a workmen's compensation act.

WALTER F. DODD

Chicago.

Procedure and Practice Before the United States Board of Tax Appeals. Sixth Edition. Chicago: Commerce Clearing House, Inc. Pp. 198—A new edition of a handbook which briefly but effectively covers its subject.

X.

Maitland: Selected Essays. Edited by H. D. Hazeltine, G. Lapsley, P. H. Winfield. 1936. Cambridge: at the University Press; New York: The Macmillan Co. Pp. ix, 264.

Equity. By F. W. Maitland. Revised and annotated by John Brunyate. 1937. Cambridge: at the University Press; New York: The Macmillan Co. Pp. xxiv, 343.

Frederick William Maitland was a genius. English law from before the time of legal memory has never known his like. Three volumes of *Collected Papers* (1911) contain his sixty-eight scattered articles, unmistakably his in style and brilliant scholarship, but these have long been exhausted at the publisher's and virtually unobtainable. In partial response to a continued demand for their reissue, and for the convenience of students, six of these papers have now been edited and reprinted. Unfortunately those chosen are confined to the problem of the corporation (The Corporation Sole; The Crown as Corporation; The Unincorporate Body; Trust and Corporation; Moral Personality and Legal Personality; The Body Politic, a subject in which Maitland was never quite at home and always under the spell of the brooding and omnipresent *Genossenschaftstheorie*. Professors Hazeltine and Winfield between them are responsible for the editing of these six: this takes the form of additional references in the notes and the translation of such German quotations as appear in Maitland's text. The new literature to which the editors direct attention to keep the papers 'abreast of later research' is very curiously chosen: some of it antedates Maitland's work and in most sec-

tions there are glaring omissions. The German translations, on the other hand, are adequate. To these six papers has been prefixed slightly less than one-half of Maitland's introductory essay to his edition of the parliament roll of 1305, a volume printed in the Rolls Series in 1893. This work is still available at the Stationery Office, at the price for which it sold at publication, and the student may have not only the complete introductory essay but the roll of parliament as well. Nevertheless we must say a word in praise of Mr. Lapsley's admirably concise introductory note and bibliography which sum up very well indeed the general drift of parliamentary historical studies since Maitland's essay was written and provide the reader with the most important of the recent literature. Though students may welcome these corporate essays in convenient, single-volume form we must continue to urge upon the Cambridge University Press an omnibus and unretouched Maitland.

Maitland's twenty-one lectures on equity were published after his death, but from his notes, by two of his students. The present volume represents the first revision they have had since 1909. The text has been left, as far as possible, unaltered, and Mr. Brunyate has accommodated the changes of almost thirty years, and legislation as far-reaching as the Property Acts of 1925, by editorial additions to the footnotes and five lengthy supplementary discussions. In these lectures Maitland quite evidently was interested in presenting a picture of contemporary, nineteenth-century equity, and the volume as a whole, despite the careful work lavished upon it by its editor, continues to bear that date on every page. For their skilful and lively presentation, and as a picture of equitable doctrine after the Judicature Acts of 1873-5, the original lectures perhaps deserved republication, but they do not easily bear the weight of new material and gain not at all by editing. The volume doubtless will be useful, but we fear it does not succeed in presenting itself as a unified whole. The fault lies more, perhaps, with Maitland than with Mr. Brunyate (though the publishers certainly cannot be exonerated,) for without wholesale revision a more integrated result was not to be expected. Readers will not infrequently find Maitland's pages an historical introduction to the editor's notes (lectures 16 and 17) and will echo his misgivings upon Maitland's classification of equitable rights.

S. E. THORNE
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Federal and State Control of Milk Prices, by James A. Tobey. 1937. Chicago: International Association of Milk Dealers. Pp. 42—This brochure is the sequel to *The Legal Aspects of Milk Control*, published a year earlier. It is scrupulously factual, and barren of theoretical implication. Briefly, it is a colorless scorecard of the judicial reactions to milk price legislation since 1933.

The forty-otld pages, however, are replete with evidence which tends to confirm the apparent failure of price regulation in the milk field. At the outset, federal power has been hemmed in by the confining pattern of interstate commerce. Even the states, with adequate police power and intricate administrative machinery, have found price control in this field far from satisfactory. In 1934 New York was permitted, by the sanction of the *Nebbia* case, to experiment with price control. Nevertheless, in 1937 it found itself unwilling to continue the experiment. Just why existing administrative tools have been helpless in the face of this highly competitive business is not explained. The author prefers to leave that to the reader's imagination.

JULIUS COHEN
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Summaries of Articles in Current Legal Periodicals

BY KENNETH C. SEARS
Professor of Law, University of Chicago

CONSTITUTIONAL LAW

That which "Directly" Affects Interstate Commerce, D. J. Farage, 42 Dickinson L. Rev. 1. (O. '37; Carlisle, Penn.)

In a short article consideration is again directed to Schechter Poultry Corp. v. U. S., the "sick chicken" case. In its opinion in that case, the court stated: "In determining how far the federal government may go in controlling intrastate transactions upon the ground that they 'affect' interstate commerce, there is a necessary and well established distinction between direct and indirect effect." The author challenges the statement that the distinction is well established by stating that the cases in point cited by the court were cases which passed upon *state* statutes which were alleged to infringe upon federal power. There is also a challenge to the court's statement that the distinction is "necessary" but this involves an agreement upon the meaning of the terms "direct" and "indirect." With reference to this there seems to be no well accepted meaning with the various judges of the Supreme Court. This is demonstrated by comparing the views expressed in the Schechter, Carter Coal Company, and the Labor Board cases.

CONSTITUTIONAL LAW

Constitutional Issues in the Supreme Court, 1936 Term, Osmond K. Fraenkel, 86 Univ. of Pennsylvania L. Rev. 38. (N. '37; Philadelphia, Pa.)

At the outset we are informed that (1) "The term just ended will probably rank in the history of the Supreme Court as one of its most important sessions," and that (2) in a greater number of decisions than at any other term in the Court's history one vote determined the outcome. The article is an interesting review of the work of the Court on constitutional questions under the following classification: (1) "The Twilight of 'States Rights'"; (2) "A Humanized Due Process Clause"; (3) "Equal Protection"; (4) "Civil Liberties"; (5) "Delegation of Powers"; (6) "Taxation of Sovereign Instrumentalities"; (7) "Restrictions on the States"; and (8) "Practice Questions." In his "Conclusion" the author does not appear to be very certain of his own ideas about restrictions upon the power of the Supreme Court. Observe what appears to be an internal conflict in Mr. Fraenkel's mind: (1) The case against the Court is a strong one; it rests primarily on the proposition that it permitted itself to sit in judgment on the wisdom of legislatures; (2) "The assumption by

some liberals that the abolition of judicial review will permit the forward march toward the desired goal is naive . . . To curb the abuses of judicial review it is not necessary to burn down the house of judgment." Perhaps, however, he would be satisfied with the adoption of another idea, apparently a very sensible one, to simplify the process of amending the constitution "so that the people may be enabled promptly to correct interpretations by the Supreme Court which run counter to the considered views of the majority."

INTERNATIONAL RELATIONS

The Power of Congress and the President in International Relations: Three Recent Supreme Court Decisions, Stefan A. Riesenfeld, 25 California L. Rev. 643. (S. '37; Berkeley, Calif.)

The three important cases reviewed are Van Der Weyde v. Ocean Transport Co., Ltd., 297 U. S. 114, United States v. Curtiss-Wright Export Corp., 299 U. S. 304, and United States v. Belmont, 301 U. S. 324. The first opinion deals with the power of the executive to terminate treaties; the second opinion discusses the dogma of delegation of powers in the conduct of international relations; and the third considers the power of the President to make agreements with foreign countries which are not treaties that require the approval of two-thirds of the Senate. The author devotes most of his article to the Van Der Weyde case and he is critical of the sweeping language in Mr. Chief Justice Hughes' opinion. He would restrict the holding to a recognition "that under certain circumstances the termination of treaties through notice in compliance with its terms can be given without concurrence of two-thirds of the Senate but by the President alone following a direction of Congress." The chief interest in the Curtiss-Wright case is not its conclusion that the President and Congress, "cooperating in the field of international relations" are not hampered by "a strict application of the doctrine of separation of powers" but the general discussion by Mr. Justice Sutherland of the theory that the United States has "full sovereignty" in international relations and that this sovereignty does not depend upon the affirmative grants of the constitution. The majority opinion in the Belmont case is an attempt to rationalize our practices in the execution of agreements with foreign nations. Some are treaties that require ratification by two-thirds of the Senate. Other agreements are made by the President with the authority of Congress and still others are made by the President alone. That upheld in the Belmont case was of the latter type; "but it is still vague as to how the powers of the federal government in the conduct of foreign relations are distributed between the President and Congress."

PLEADING

Objections to Pleadings Under the New Federal Rules of Civil Procedure, James A. Pike, 47 Yale L. Jour. 50. (N. '37; New Haven, Conn.)

In order to consider that aspect of the proposed Federal Rules of Civil Procedure which attempts to minimize the dilatory effect of objections to pleadings, the author discusses the demurrer and its counterparts, to-wit: (1) the modified demurrer found in most states: (2) the objection in law found in England; (3) the motion to dismiss in the Federal Equity Rules; and (4) the motion for a judgment found in several states. The rule on defenses proposed by the advisory committee of the Supreme Court adopted the best features of the English procedure and of the Federal Equity Rules; but in the final draft two undesirable modifications were made. "Despite these probable defects in the final draft of the rule on defenses, it embodies definite advances over the present demurrer practice." Objections for form are discouraged but the proposed rule on defenses recognizes that for at least two types of formal defect a remedy is desirable. The proposed rule for amendment of pleadings "represents a compromise between the present equity rule and the practice obtaining in England and under the codes." A question is raised whether written pleadings should be eliminated in favor of an oral formulation of the issues by a conference with a judge. Proposed rule 16 does not provide for such a radical change but for a discretion in the court to have a conference for simplification of the issues and dispatch of the trial.

TAXATION

The Supreme Court on Taxation, 1936 Term, Charles L. B. Lowndes, 86 Univ. of Pennsylvania L. Rev. 1. (N. '37; Philadelphia, Pa.)

The first installment of an extensive and clear review of the recent decisions on taxation by the U. S. Supreme Court considers the cases under the following sub-titles: (1) "The Scope of the Federal Taxing and Spending Powers"; (2) "Federal and State Immunity from State and Federal Taxes"; and (3) "State Taxation of Inter-state Commerce." Under the first subtitle there is a discussion of the decisions sustaining various parts of the Social Security Act, the processing tax on Philippine coconut oil, and the prohibitive tax under the National Firearms Act. Most of the consideration under the second sub-division is devoted to the unsuccessful attempt of the United States to tax the salary of the chief engineer of the New York City Bureau of Water Supply, the equally unsuccessful attempt of New York to tax the compensation of the general counsel of a private New York corporation which, however, was owned by the United States and used in the operation of the Panama Canal, and also a federal tax upon the manufacture of tobacco sold to a state and a state tax upon machinery used in connection with an oil lease on restricted Indian land. Under sub-division three an analysis is made of Heneford v. Silas Mason Co., State Board of Equalization v. Young's Market Co., Great Northern Railway Co. v. Washington, Bourjois, Inc. v. Chapman, Ingels v. Morf, and Southern Natural Gas Corporation v. Alabama.

TRADE-MARKS

Trade-Mark Problems and Trade-Mark Laws, Frank S. Moore, 7 Brooklyn L. Rev. 20. (O. '37; Brooklyn, N. Y.)

For a novice, at least, this article gives an interesting survey of trade-mark law and presents a problem that deserves a solution. The world presents two systems of trade-mark jurisprudence; the continental system, under which "substantive trade-mark rights are created by the registration of a trade-mark with a public agency pursuant to a statute"; and the common law system under which a trade-mark is not property by itself but as a part of the good-will of a business. The national constitution does not mention trade-marks but in 1870 Congress authorized the registration of trade-marks and attempted to create substantive trade-mark rights. This Act was invalidated by the Supreme Court. In

1881 Congress passed another act providing for the registration in the Patent Office of trade-marks used in interstate but not in intrastate commerce. Another act was passed in 1905 and this as amended is still in force, and it is believed to be constitutional. There are also existing state statutes which affirm the common law system of substantive trade-mark rights. This system is not entirely satisfactory and state legislatures, looking for more revenue, are threatening to replace the common law system with a statutory continental system. Diverse statutes may produce chaos and this should be prevented by the universal enactment of an uniform statute. But an adequate statute of this sort is difficult to formulate. Perhaps "an additional grant of power must be made to the federal government."

Administration of Justice, Etc.

(*Continued from page* 938)

confidence. Politics would be reasonably removed under this method, and a judge would be defeated for re-election only if his record showed his incompetence or lack of proper qualifications for judicial office. A voter, although left free to retain or retire a judge at will, would be compelled to face the issue of his competency and his judicial record, unobscured by irrelevant matters. This plan would result in the retention without political activity of the conscientious and qualified judge, and at the same time would facilitate the removal of the unworthy judge. The incumbent would be running solely upon his record without any political contest as to personalities and extraneous issues, as under the present elective system. So long as his record is favorable, he would have nothing to fear. It is believed that under this method well qualified and competent judges would be uniformly retained, and unfit judges would be readily eliminated. Thus there would be adequate security of tenure and effective administration of justice, so that the courts should be expected properly to perform their functions and retain a full measure of public respect.[88]

It is true that there might be some danger of an able judge being defeated on account of his meritorious but unpopular decisions. As a rule, however, the memory of the public upon such matters is short-lived, and in view of the long terms of office, it would usually be several years later before a judge runs for re-election, and ordinarily any particular decisions will have little effect upon the voters at that time. "The chances that fever-heat over a decision will coincide with election-day are fairly remote.[89] The longer the term of office, the less likely will unpopular decisions have any effect in influencing such elections. Also a longer term reduces the re-election hazard, and as to the qualified judge tends to make judicial office a career.[90] In any event the advantages of this method would in our opinion far outweigh this disadvantage.

The foregoing plan in substance was approved by resolution adopted last January at the Columbus meeting of the House of Delegates of the American Bar Association. That resolution also contains these momentous words:

"The importance of establishing methods of judicial selection that will be most conducive to the maintenance of a thoroughly qualified and independent judiciary that will take the state judges out of politics as nearly as may be, is generally recognized."[91]

This plan is advocated by numerous authorities and students of the problem.[92] It is believed that it would be beneficial, effective and politically feasible. It is substantially similar to the plan adopted by constitutional amendment in California in 1934 and now in effect there, and which will be submitted to the voters of Ohio next November.[93] It is also under serious consideration by bar associations in a dozen or more other states.[94]

In some states having large cities it may be found advisable from a practical standpoint to include also in the plan the local option feature as to selection of trial court judges, so that the change in that respect may be voted upon separately in each county or judicial district.[95] In this manner this improvement may be made more readily in large metropolitan counties, where the need for judicial reform is more urgent, and may be adopted later as may be desired by the electorate in rural counties. Ultimately, however, it is believed that the same should be made uniform throughout the state as to all state court judges.[96]

Under such a plan the members of the bar, who know the most about the professional qualifications of candidates and who have the greatest personal interest in securing competent judges, would be able to exercise much greater intelligent influence upon such a judicial commission, composed largely of other attorneys, and upon the governor, than they could upon a

88. Among the numerous excellent discussions favoring the appointment rather than election of judges are those of Professor Charles T. McCormick, "A Proposed Reorganization of the Illinois Judiciary," 29 Ill. L. Rev. 31 (1934), and "Judicial Selection—Current Plans and Trends," 30 Ill. L. Rev. 446 (1935), and those of Stuart H. Perry, "The Judiciary and the Press," 16 Jour. Am. Jud. Soc. 108 (1932), "Politics and Judicial Administration," 169 Annals Am. Acad. Pol. & Soc. Sci. 75, 17 Jour. Am. Jud. Soc. 133 (1933), and "Shall We Appoint Our Judges," 19 Jour. Am. Jud. Soc. 78 (1935). See also, Edward M. Martin's recent book, "The Role of the Bar in Electing the Bench in Chicago" (1936). A handbook on the selection of judges is in preparation by Professor Evan Haynes of the University of California, School of Jurisprudence. Bibliographies on the subject may be found in 8 U. of Cincinnati L. Rev. 519-522 (1934); Willoughby, "Principles of Judicial Administration," pp. 607-652 (1929); Martin, supra, p. 366. An interesting debate on the subject is reported in 19 A. B. A. J. 669 (1933).

89. McCormick, "Judicial Selection—Current Plans and Trends," 30 Ill. L. Rev. 446 (1935).

90. Martin, "The Role of the Bar in Electing the Bench in Chicago" (1936), p. 322.

91. U. S. Law Week, Jan. 12, 1937, p. 5; 23 A. B. A. J. 105 (Feb. 1937).

92. An excellent argument in favor of such a plan will be found in the reports of the Judicial Committee of the Conference of Bar Association Delegates (1935), pp. 13-28, and 1936, pp. 11-15. See also, the address of Albert M. Kales in 1914 to the Minnesota State Bar Association urging such a plan, 11 Jour. Am. Jud. Soc. 133 (1928); and Governor McNutt's address, "The Elective Method of Judicial Selection and Proposed Remedies," 20 A. B. A. J. 636 (Oct. 1934). And see the able addresses of John Perry Wood and Charles M. Thomson to the House of Delegates in support of the resolution, 23 A. B. A. J. 102-107 (Feb. 1937); Sanders, "Appointment of Judges—an Analysis of Current Proposals," 22 A. B. A. J. 131 (Feb. 1936); Finch, "A Non-Political Veto Council on Judicial Fitness," 20 A. B. A. J. 144 (March 1934) and 20 A. B. A. J. 246 (April 1934); Gambrell, "Better Ways for Selecting Judges," 17 Jour. Am. Jud. Soc. 109 (1933); Woods, "The Selection of Judges," 19 A. B. A. J. 187 (March 1933); Shartel, "Retirement and Removal of Judges," 20 Jour. Am. Jud. Soc. 133 (Dec. 1936).

93. U. S. Law Week, Jan 12, 1937, p. 5; McCormick, "Judicial Selection—Current Plans and Trends," 30 Ill. Law Rev. 446 (1935).

94. It was recently proposed by the Chicago Bar Association Committee, Time, Feb. 1, 1937, p. 33.

95. Martin, "The Role of the Bar in Electing the Bench in Chicago" (1936), p. 336.

96. 8 Univ. of Cincinnati L. Rev. 359 (1934); 1935 Report Judicial Selection Committee, Conf. Bar. Assn. Delegates, p. 23.

97. Hall, "The Selection, Tenure and Retirement of Judges," Bul. X, Am. Jud. Soc. (1915), p. 26.

large electorate.[97] The appointing agencies would be more responsive to the influence of the bar than under the elective method.[98] Moreover, the responsibility is centralized and the appointing power is sufficiently conspicuous to be reasonably amenable to public opinion.[99]

Such a judicial commission and the governor always can and as a rule will obtain full information as to the qualifications of judicial candidates; while the electorate rarely is able to do so.[100] Moreover, an important advantage of security of tenure is that, generally speaking, a judge constantly improves with experience. A man of fair natural ability and training with ten years' experience on the bench is quite certain to be a better judge thereafter than a man of greater ability during his first few years on the bench. Security of tenure thus constitutes an admirable corrective of any defects of judicial selection, as shown by American experience.[101] On the other hand, with insecurity of tenure, the state frequently loses the services of an able, experienced judge at the hands of a more adroit political compaigner.

Under this plan there would be that security of tenure which is essential to the independence of the judiciary and at the same time a sufficient measure of public participation and control to satisfy any reasonable requirements of democratic principles.[102] It is believed that such a plan, although tending to eliminate the unqualified, will add many-fold to the security of tenure of good judges, to the efficient performance of judicial duties without fear or favor, to the attractiveness of judicial office to able attorneys, and to the strength and independence of a learned, impartial, and honored judiciary.

This plan avoids on the one hand the Scylla of judicial incompetence, corruption or arbitrary conduct, and on the other hand steers clear of the Charybdis of insecurity of tenure and partisan politics, which tend to undermine not only the dignity and prestige of the courts, but also the efficient performance of judicial duties. It is believed that such a plan will, so far as reasonably possible, remove the judges from the arena of politics and improve the administration of justice through obtaining greater security of tenure, while at the same time retaining all of the advantages of an expression of the will of the people, not amid the clamor of several competing candidates, but soberly upon the record of the incumbent judge. Thus given security of tenure, independent of all political, personal, or temporary considerations, we may reasonably expect the judges to administer justice without fear or favor, and the essential independence of the judiciary will be preserved.

It is frequently stated that ours is a government of laws and not of men. But if we concentrate entirely on improving our laws and overlook the vital necessity of improving the methods of selection and tenure of the men who as judges sit upon the bench to administer those laws, we shall not have performed our full duty in solving the great American problem of improving the administration of justice.[103]

It is useless, ostrich-like, to blind ourselves longer to the indubitable facts that justice depends upon the judge, and that to assure good judges, the old outworn short-term elective system must be discarded and the appointive method with security of judicial tenure must be adopted. No greater responsibility confronts the American bar today than that of safeguarding the competence, integrity and independence of the courts, into whose care is so largely committed the daily protection of life, liberty and property. Obtaining better judges and more efficient judicial service, with more intelligent methods of selection and greater security of tenure, must be the very foundation of any movement for the improvement of the administration of justice. It is appropriate that we commence this great task by adhering to the principle, *let us be just to our judges,* through providing greater security of tenure, and the public will be repaid many-fold through higher standards of judicial service. In this manner we may do our part in rendering the courts more effective instrumentalities for the enlightened administration of justice, which is, in the words of Daniel Webster, "the greatest interest of man on earth."

98. McCormick, "Judicial Selection—Current Plans and Trends," 30 Ill. Law Rev. 446 (1935).
99. Hall, supra, note 97, p. 27.
100. Hall, supra, note 97, p. 18.
101. Hall, supra, note 97, p. 19.
102. Megan, "Selection and Tenure of Judges," 8 Univ. of Cincinnati Law Rev. 466 (1934).
103. Judge McDermott, 18 Jour. Am. Jud. Soc. 101 (Dec. 1934).

Some Problems of Current Tax Administration

(*Continued from page* 949)

bygone modes of thought."[2] The creation of the action against the United States in the Court of Claims, its extension to the District Courts, and the creation of the Board of Tax Appeals with its jurisdiction to find overpayments give the taxpayer an adequate remedy. There would remain to be done only the removal of the formal limitation on amount in suits in the District Courts to recover overpayments.

Since the action against the Collector, although merely a pro forma proceeding to recover from the United States, remains a purely personal one at common law against a private individual, a final judgment on the merits against the taxpayer does not bar a second suit against the United States in the Court of Claims or in the District Court for refund of the overpayment of the same tax unsuccessfully sued for in the suit against the collector. Logic, public policy, and common sense would seem to compel the discontinuance of this device which so patently violates the policy underlying the doctrine of res judicata. Any measure, however, should not disturb remedies against the collector for wrongs committed under color of his office, but should be confined to the abolition of these suits against the collector which are merely remedial expedients for bringing the United States into court in order to recover over-payments of tax. The action was abolished in customs cases in 1890. Nothing has developed since that time to indicate that its abolition in tax cases should be any longer delayed.

In recent years it has frequently been observed that taxpayers as well as the Government could be spared many confusing difficulties by the adoption of an administrative code which would assemble all the administrative provisions relating to internal revenue. These provisions, being fairly permanent in nature, would not need re-enactment with the passage of every new revenue act.

As a matter of fact, the Staff of the Joint Committee on Internal Revenue Taxation undertook some years ago the preparation of such a code, but because

2. George Moore Ice Cream Co. v. Rose, Collector, 289 U. S. 373, 382. (1932)

its effectiveness depended upon the codification of the substantive provisions as well, the project eventually gave way to a codification of all the internal revenue laws which was submitted to the Committee in 1930 and brought up to date in 1933. It was then substituted for Title 26 of the United States Code as contained in Supplement VI of that document, and except for subsequent additions and amendments is prima facie evidence of the law. This codification was an enormous task, and every reasonable check was made to insure its accuracy. The staff of the Joint Committee is now engaged in bringing the 1933 codification up to date, with a view to its enactment as absolute law. Its adoption would accomplish for the internal revenue laws what the Revised Statutes accomplished generally in 1873, and would be an excellent first step toward the ultimate adoption of the United States Code as absolute law.

The admirable service already performed by the Joint Committee and its staff paves the way for the preparation of an administrative code. This new task, however, if it is to be worth the effort, would involve not merely the assembling and restatement of existing law, but a critical and exhaustive study of each administrative provision with a view to revision whenever it seemed out of harmony with current realities. The undertaking would be a tremendous one, for in addition to a thorough combing of every provision for the elimination of excess verbiage or ambiguities, it would entail also a comprehensive examination of all court decisions construing present provisions in order to insure the retention of existing language whenever it was necessary to conserve the value of established precedents and avoid the risk of running a new gauntlet of litigation. Some coherence might thus be given to a revenue system which has been haphazardly grafted onto a structure designed to collect mainly such excise taxes as those on tobacco and liquor, requiring physical measurement under the eye of a revenue agent.

Voting for State Delegates in 1938

WITH the opening of the 1938 annual meeting set for July 25th, nominating petitions for State Delegate, signed by twenty-five or more members of the Association in good standing, in that State, will have to be filed with the Board of Elections not less than 150 days before that date. This means that, as announced by the Board of Elections in the November *Journal*, nominating petitions will have to be filed on or before February 25th. Forms of nominating petitions have been prepared by the Board of Elections, and may be obtained on request to the Association Headquarters.

This will be the first *general* election of State Delegates, through nominations by petition and election by mail ballot, under the new Constitution. Pursuant to Article XIII, Section 2, the members of the former General Council were continued as State Delegates until the expiration of the terms for which they were elected. This provision was not amended in Kansas City. Except where vacancies have arisen by resignation, death, or absence from an annual meeting, the terms to which members of the former General Council were elected were to expire with the adjournment of the annual meeting (old By-laws, Article VI, Section 1). State Delegates elected by mail ballot to fill vacancies, under Article V, Section 5, of the present Constitution, "serve for the unexpired term" and will be in office at the time the State Delegates make their nominations for Association officers and members of the Board of Governors next May. Persons chosen temporarily to fill vacancies in the office of State Delegate, by the members of the Association present from their State at the Kansas City meeting, serve until a successor has been nominated by petition and elected by mail ballot.

A State Delegate will be nominated and elected, in 1938, from each State, the District of Columbia, and the Territorial Group. Under the amendment of Article V, Section 5, of the Constitution of the Association, published in the August issue of the JOURNAL and adopted by the Assembly and House of Delegates in Kansas City, one-third of the State Delegates will be elected in 1938 for each a one-year, two-year and three-year term. The Board of Elections has met and determined its allotment of the States between the respective terms. Its announcement was published in the November JOURNAL. The 1938 nominations and elections will be made accordingly.

The amendment of Article V, Section 5, adopted in Kansas City, provides that

> "After 1938 each State Delegate shall be elected for a term of three years. The term of each State Delegate shall begin with the beginning of the annual meeting next following his election and shall end at the beginning of the third annual meeting thereafter."

Accordingly, after 1938, one-third of the State Delegates will be nominated and elected each year, and will take their places in the House of Delegates immediately upon the convening of the annual meeting next following their election. If questions arise as to the effect, if any, of the above provision upon the beginning of terms of State Delegates elected in 1938, the same will be for determination by the House of Delegates (Constitution, Article V, Section 8) at the opening of its Cleveland meeting next July.

In addition to the nomination and election of State Delegates for the regular terms, there will take place next Spring the nomination and election, by mail ballot, of State Delegates to fill vacancies caused by resignations or failure to register by 12 o'clock noon on the opening day of the Kansas City convention. In Kansas and New Hampshire, the vacancies to be filled are due to the resignations of the incumbents. In Kentucky and Hawaii, there are vacancies due to the failure of the incumbents to register. In at least these four jurisdictions, there will be nominations and elections both for the unexpired term and for the regular term.

Lawyers who are not now members of the Association will do well to present their applications for membership promptly, if they wish to take part in the nomination and election of the State Delegate from their State early in 1938. Time is inevitably required for the consideration of such applications by the State Membership Committee and by the Board of Governors. Every eligible lawyer in each State should lose no time in applying for membership in the Association, so that he will not be disenfranchised in the election of a State Delegate to represent his State in the House of Delegates.

Officers of Sections 1937-38

Bar Organization Activities

Chairman, Carl V. Essery.....Detroit, Mich.
Vice-Chairman, R. Allan Stephens.....Springfield, Ill.
Secretary, L. Stanley Ford.....Hackensack, N. J.
Council: Morris B. Mitchell, Minneapolis, Minn., last retiring Chairman, W. E. Stanley, Wichita, Kans., Frank E. Atwood, Jefferson City, Mo., Raymer F. Maguire, Orlando, Fla., Forest G. Moorhead, Beaver, Pa., William W. Evans, Paterson, N. J., R. Wayne Lawler, Houston, Texas, Carl B. Rix, Milwaukee, Wisc., O. B. Thorgrimson, Seattle, Wash.

Criminal Law

Chairman, Rollin M. Perkins.....Iowa City, Iowa
Vice-Chairman, Louis S. Cohane.....Detroit, Mich.
Secretary, Henry W. Toll.....Denver, Colo.
Council: The officers ex-officio and Sanford Bates, New York, N. Y., James J. Robinson, Bloomington, Ind., Albert J. Harno, Urbana, Ill., Earl Warren, Oakland, Calif., George A. Bowman, Milwaukee, Wisc., Sylvester C. Smith, Jr., Phillipsburg, N. J., Arthur J. Freund, St. Louis, Mo., Wayne L. Morse, Eugene, Ore.

Insurance Law

Chairman, Howard D. Brown.....Detroit, Mich.
Vice-Chairman, Lionel P. Kristeller.....Newark, N. J.
Secretary, Howard C. Spencer.....Rochester, N. Y.
Council: The officers ex-officio and Jesse A. Miller, Des Moines, Iowa, last retiring Chairman, John W. Cronin, Boston, Mass., Clement F. Robinson, Portland, Maine, Eugene Quay, Chicago, Ill., John A. Luhn, Baltimore, Md., Felix Hebert, Providence, R. I., Joe S. Lewis, Ponca City, Okla., J. Harry LaBrum, Philadelphia, Pa., Prentiss E. Reeder, Kansas City, Mo.

International and Comparative Law

Chairman, John P. Bullington.....Houston, Texas
Vice-Chairman, J. Emmett Sebree.....Washington, D. C.
Secretary, John T. Vance.....Washington, D. C.
Council: The officers ex-officio and Charles A. Beardsley, Oakland, Calif., James W. Ryan, New York City, William S. Culbertson, Washington, D. C., Edward Schuster, New York, N. Y., Frederick K. Beutel, Cambridge, Mass., John H. Wigmore, Chicago, Ill., Edward W. Allen, Seattle, Wash., James Oliver Murdock, Washington, D. C.
Advisory Committee: Nathan William MacChesney, Chairman, Chicago, Ill., Frederic R. Coudert, New York, N. Y., Edwin D. Dickinson, Berkeley, Calif., Roscoe Pound, Cambridge, Mass., Green H. Hackworth, Washington, D. C., Phanor J. Eder, New York, N. Y., Joseph W. Henderson, Philadelphia, Pa.

Judicial Administration

Chairman, John J. Parker.....Charlotte, N. C.
Vice-Chairman, Charles A. Goss.....Lincoln, Neb.
Secretary, Van Buren Perry.....Aberdeen, S. D.
Council: The officers ex-officio and Augustus N. Hand, New York, N. Y., Marvin B. Rosenberry, Madison, Wisc., James W. McClendon, Austin, Texas, George W. McClintic, Charleston, W. Va., Ernest A. Inglis, Hartford, Conn., Henry T. Lummus, Boston, Mass., Joseph A. Moynihan, Detroit, Mich., Merrill A. Otis, Kansas City, Mo.

Junior Bar Conference

Chairman, Weston Vernon, Jr.....New York, N. Y.
Vice-Chairman, Harold B. Wahl.....Jacksonville, Fla.
Secretary, Paul F. Hannah.....Washington, D. C.
Council: The officers ex-officio and Joseph D. Stecher, Toledo, O., last retiring chairman, Richard H. Field, Boston, Mass., Benedict M. Holden, Jr., Hartford, Conn., Joseph Harrison, Newark, N. J., Lewis F. Powell, Jr., Richmond, Va., Peyton D. Bibb, Birmingham, Ala., Earl F. Morris, Columbus, Ohio, Donald B. Hatmaker, Chicago, Ill., Ronald J. Foulis, St. Louis, Mo., Grant B. Cooper, Los Angeles, Calif., Frank F. Eckdall, Emporia, Kans., Charles E. Pledger, Jr., Washington, D. C.

Legal Education and Admissions to the Bar

Chairman, R. G. Storey.....Dallas, Texas
Vice-Chairman, Charles E. Dunbar, Jr..New Orleans, La.
Secretary, Alexander B. Andrews.....Raleigh, N. C.
Adviser, Will Shafroth.....Ann Arbor, Mich.
Council: The officers ex-officio and Sylvester C. Smith, Jr., Phillipsburg, N. J., W. E. Stanley, Wichita, Kans., Charles H. English, Erie, Pa., R. Allan Stephens, Springfield, Ill., James E. Brenner, Stanford University, Calif., Philip J. Wickser, Buffalo, N. Y., Merrill E. Otis, Kansas City, Mo., Robert L. Stearns, Boulder, Colo.

Mineral Law

Chairman, James L. Shepherd, Jr.....Houston, Texas
Vice-Chairman, Stanley B. Houck....Minneapolis, Minn.
Secretary, Peter Q. Nyce.....Washington, D. C.
Council: The officers ex-officio and James C. Denton, Tulsa, Okla., Donald C. McCreery, Denver, Colo., Floyd A. Calvert, Saginaw, Mich., Robert Stone, Topeka, Kans., William O. Beall, Tulsa, Okla., J. V. Norman, Louisville, Ky., William A. Dougherty, New York, N. Y., Robert E. Hardwicke, Fort Worth, Texas.

Municipal Law

Chairman, Murray Seasongood.....Cincinnati, Ohio
Vice-Chairman, Henry P. Chandler.....Chicago, Ill.
Secretary, Arnold Frye.....New York, N. Y.
Council: The officers Ex-officio and Walter Chandler, Memphis, Tenn., James H. Pershing, Denver, Colo., Francis X. Busch, Chicago, Ill., Henry F. Long, Boston, Mass., Charles M. Hay, St. Louis, Mo., Morton L. Wallerstein, Richmond, Va., Edward F. Merrey, Paterson, N. J., Stephen B. Robinson, Los Angeles, Calif.

Patent, Trade-Mark and Copyright Law

Chairman, Bert M. Kent.....Cleveland, Ohio
Vice-Chairman, Thomas E. Robertson..Washington, D. C.
Secretary, Cyril A. Soans.....Chicago, Ill.
Council: The officers ex-officio and Jo Baily Brown, Pittsburgh, Pa., Milton Tibbetts, Detroit, Mich., Leonard S. Lyon, Los Angeles, Calif., George Ramsey, New York, N. Y., Robert Cushman, Boston, Mass., George L. Wilkinson, Chicago, Ill., Elwin A. Andrus, Milwaukee, Wis., Delos G. Haynes, St. Louis, Mo.

Public Utility Law

Chairman, Walter Chandler.....Memphis, Tenn.
Vice-Chairman, Richard J. Smith.....New York, N. Y.
Secretary, Elmer A. Smith.....Chicago, Ill.
Council: The officers ex-officio and Elmer A. Smith, Chicago, Ill., last retiring chairman, Ivan Bowen, Minneapolis, Minn., Walter S. Fenton, Rutland, Vt., William G. Fitzpatrick, Detroit, Mich., Harold J. Gallagher, New York, N. Y., Douglas Arant, Birmingham, Ala., T. Baxter Milne, Washington, D. C., Joseph F. Berry, Hartford, Conn., J. Purdon Wright, Baltimore, Md.

Real Property, Probate and Trust Law

Chairman, Nathan William MacChesney.....Chicago, Ill.
Vice-Chairman, Henry Upson Sims....Birmingham, Ala.
Secretary, James E. Rhodes, II.....Hartford, Conn.
Assistant Secretary, R. G. Patton....Minneapolis, Minn.
Assistant Secretary, Eleanor S. Burr.....Boston, Mass.
Council: The officers ex-officio and R. G. Patton, Minneapolis, Minn., William C. Ramsey, Omaha, Nebr., George C. Gertman, Washington, D. C., Charles E. Lane, Cheyenne, Wyo., Mary F. Lathrop, Denver, Colo., Ralph H. Spotts, Los Angeles, Calif., William C. Ralston, Topeka, Kans., Harold L. Reeve, Chicago, Ill.
Real Property Division: George E. Beers, Chairman, New Haven, Conn. *Probate Division:* W. M. Crook,

A group of the Association's officers snapped at Kansas City. L. to R. (standing)—Harry S. Knight, Secretary, and John H. Voorhees, Treasurer. Seated—Arthur H. Vanderbilt, President, and George M. Morris, Chairman of House of Delegates. Insert—Joseph D. Stecher, Assistant Secretary.

Chairman, Beaumont, Texas. *Trust Division:* George G. Bogert, Chairman, Chicago, Ill.

National Conference of Commissioners on Uniform State Laws

President, Alexander Armstrong.....Baltimore, Md.
Vice-President, Harry P. Lawther.....Dallas, Texas
Treasurer, Murray M. Shoemaker.....Cincinnati, Ohio
Secretary, William C. Ramsey.....Omaha, Nebraska

Executive Committee: The officers, ex-officio and Orie L. Phillips, retiring President, Denver, Colo., William A. Schnader, Chairman, Philadelphia, Pa.; Robert T. Barton, Jr., Richmond, Va.; William M. Hargest, Harrisburg, Pa.; John C. Pryor, Burlington, Iowa; John H. Wigmore, Chicago, Ill. John P. Deering, Chairman of Legislative Committee, Saco, Maine.

OUR NEW ASSISTANT SECRETARY: JOSEPH D. STECHER

MR. JOSEPH D. STECHER, elected Assistant Secretary of the American Bar Association at Kansas City, was born in Upper Sandusky, Ohio, February 22, 1904. He was graduated from Ohio Wesleyan University with the degree of A. B. in 1925 and from Ohio State University with the degree of J. D. in 1928. He was elected to the Order of the Coif, Delta Sigma Rho (honorary forensic), and is a member of Delta Theta Phi (legal) and Alpha Sigma Phi fraternities.

He was admitted to the Bar of Ohio in 1928 and located in Toledo. Since 1933, he has been a member of the firm of Yager, Bebout & Stecher, of Toledo.

He has been a member of the Executive Council of the Junior Bar Conference of the American Bar Association since its organization in Milwaukee, Wisconsin, in 1934. He has also held the following positions in the Conference: Chairman, 1936-37; Vice Chairman, 1935-36; Chairman of Activities Committee, 1935-36; Chairman of Membership Committee, 1934-35; Chairman of Resolutions Committee, 1935.

He has also served elsewhere in the following positions: Member of House of Delegates of the American Bar Association (1936-37); Member of Committee on Voluntary State Bar Association Administration of Section on Bar Organization Activities (1936-37); President of Junior Bar Section of Ohio State Bar Association (1935-36); Member of Executive Committee of Toledo Bar Association (1936-38); member of numerous committees of the Toledo and Ohio State Bar Associations; President of the Toledo Junior Chamber of Commerce (1936-37); Vice-president of the same organization (1935-36), and National Councillor (1937-38).

He was married to Miss Alice Heesen of Toledo, Ohio, on January 23, 1937.

Current Events

AT the Kansas City meeting of the Section on Bar Organization Activities, The Association of the Bar of the City of New York received the Morris B. Mitchell award to the local Bar Association that makes the best report "on the activity most beneficial to the Bar and the public."

The report which won the 1937 award was prepared by the Secretary of the Association, Mr. Charles H. Strong, who is its Delegate in the House of Delegates. The Association had in Kansas City the largest representation from a local Association outside the State of Missouri. The winning report follows:

"In reply to the notification contained in the April number of 'The Bar Association Executive,' I feel free to call your attention to one or two activities of this Association during the year 1936-1937 which the publications committee may think of benefit to the Bar and the public.

"The extent to which business in New York City had become the prey of criminal racketeers had been suspected, but never demonstrated or successfully coped with until our Association procured the appointment of its able and faithful member, Thomas E. Dewey, then the chairman of its committee on criminal courts, to head the investigation and prosecution of this spreading form of criminality. Last year President Clarence J. Shearn ventured to predict that results would be achieved justifying our activities in procuring his appointment. While the end is not yet, the results during the past few months, known to all, amply justify that prediction. We are proud of his courage, his professional ability, and his zeal for public service; also of the fact that he is a loyal and devoted member of our Association.

"Another form of racketeering which has been a plague to the courts and a humiliation to the profession, as well as a burden upon the taxpayer, has demanded our vigorous attention. We refer to the frauds in personal injury suits and the form of wholesale solicitation commonly known as 'ambulance chasing.' To strike effectively at these evils we assisted in setting up last year, with the co-operation of Presiding Justice Francis Martin, an accident fraud bureau in the office of District Attorney Dodge. With the cordial approval of the district attorney and the board of estimate and apportionment, a complete and separate investigating and prosecuting unit was established at No. 54 Lafayette street, in charge of Assistant District Attorney Bernard Botein, assisted by William F. O'Rourke and Lyon Boston, also assistants of the district attorney, with a corps of investigators, process servers, clerks and stenographers. The city appropriated $75,000 for the work, and this Association undertook to man this new unit of the district attorney's office with competent assistants for the period of the investigation. During the year of this bureau's activities we have, with some help from the New York County Lawyers Association, provided forty-five assistants to Mr. Botein in the conduct of this work, all serving as volunteers, some for a period of more than four months each, and all for at least a period of two months. How necessary this work was we all know. How thoroughly and competently it has been conducted is indicated by the fact that to date there have been eighty-three convictions, among whom are nine doctors, nine lawyers, twenty runners and forty-three fake personal injury claimants. In addition to the nine lawyers convicted, ten have resigned from practice, and the cases of seventy-four attorneys have been referred to the Grievance Committee of this Association, where they are being dealt with as expeditiously as possible.

"To insure that this should be no mere spasmodic drive, with old conditions shortly cropping up again, the district attorney has promised the presiding justice and the president of this Association that immediately following the closing of this bureau in June he will set up a permanent accident fraud bureau in his office.

"Apart from the cleansing results of his investigation, what this means to honest litigants and the taxpayers is worthy of emphasis.

"A year ago 73 per cent. of the cases on the Supreme Court trial calendars in New York County were personal injury suits. In the Bronx the percentage was over 90. This means that the elaborate judicial machinery maintained at great expense by the city was mainly given over to this class of cases, a substantial part of which were fraudulent and stimulated by solicitation. Thousands of such manufactured cases clogged the calendars, while commercial and other legitimate litigation, including genuine personal injury suits, were subjected to more and more delay.

"The extent of this and what a deterring influence this investigation has already had is indicated by comparative statements of retainers filed with the Appellate Division for January and February of 1937 as compared with the same months last year. These show a decrease of 28 per cent. The significance of this is more apparent when it is realized that in 1935 99,800 contingent retainer agreements were filed.

"Notes of issue in personal injury cases filed in the City Court dropped 29 per cent. in the same months; in the Supreme Court, New York County, 16½ per cent.; in the Supreme Court, Bronx County, 50 per cent.; in the City Court, Bronx County, 36 per cent. What this means to overburdened court calendars can readily be appreciated. One practical result already manifested is a marked decrease in insurance rates. Thus the general public, the taxpayers and honest litigants are all gainers, the Bar is relieved of many crooked practitioners, and the law is vindicated.

"The Association has taken a position strongly condemnatory of such an unethical practice as that of an attorney engaging his service to known criminals or persons engaged in criminal activities as an aid to such criminal activities upon the understanding that they will represent them in the courts when trouble results. With the aid of able special counsel a long trial has been had involving charges of this character preferred by the Association against an attorney, and the case is awaiting decision in the Appellate Division. One way or the other, the case will make an important precedent."

Anti-Trust Investigation and the Cost of Living

The President writes the Federal Trade Commission that his attention "has been directed to reports of a marked increase in the cost of living during the present year, attributable in part to monopolistic practices and other unwholesome methods of competition" and asks that body to inquire thereinto and report as early as practicable.

The following day the Commission formally resolved that "with the aid of any and all powers conferred upon it by law, this commission shall undertake an immediate investigation of the matters set forth in the President's letter and shall report thereon to the President as early as possible." The Commission was to confer later with legal and economic experts on the mechanics of the inquiry and to decide whether to limit the investigation to food stocks and clothing and a few other important commodities or to include a broader range. It was made known that its investigation was expected to "run into months." It also was said that "Our report will be made as early as possible in 1938." This was considered to mean that anti-trust legislation would not be pressed at the special session.

News of the Bar Associations

Michigan State Bar Holds Largest Annual Meeting on Record for an Integrated Bar—New Organization Has Greatly Stimulated Interest in Such Activities—High Points of Program—Officers Elected by Board of Commissioners

THE first annual meeting of the State Bar, which was held at Flint, Michigan, last year had a registration of 540 lawyers—the largest convention of Michigan lawyers ever held until that time. This year's registration at Ann Arbor was 884 and an appreciable number of lawyers attended one or more of the section meetings without registering his attendance. This is the largest annual meeting of a State Bar ever held.

The tremendous success of the meeting undoubtedy is primarily due to the greater interest in bar activities by Michigan lawyers, as a result of integration of the Bar. President Roscoe O. Bonisteel, of the State Bar, has held fourteen regional meetings of lawyers during the past year which have developed a finer professional spirit among Michigan lawyers than was ever in evidence prior to integration.

The Thursday afternoon and evening program was arranged by the Insurance Committee of the State Bar, under the chairmanship of Herbert P. Orr, and was devoted particularly to a discussion of the new occupational disease legislation passed in Michigan at the last session of the legislature. The tone of this, as well as every other section meeting, was practical rather than academic and attracted a large number of lawyers who have not previously been active in bar work and have not previously attended an annual meeting.

The attendance at each of the section meetings exceeded the capacity of the largest lecture room in the University of Michigan Law School, which had chairs for 350. It was necessary on Friday to install an amplifying system with a loud speaker in another lecture room to take care of the overflow crowd.

The Insurance Section dinner in the evening was presided over by Henry C. Walters, of the State Bar Committee on Insurance. The speaker at the dinner was Dr. Carey P. McCord, of Detroit, an eminent authority on occupational diseases, who discussed the subject in layman's language.

Friday morning's program began with a breakfast attended by officers of local bar associations from all over the state. Arrangements for the breakfast were made by the State Bar Committee on Local Bar Associations, under the chairmanship of Harry G. Gault. J. L. W. Henney, Secretary of the Ohio State Bar Association, and Will Shafroth, Director of the National Bar Program, spoke at the breakfast. The attendance at the breakfast was in excess of one hundred lawyers.

GEORGE E. BRAND,
President, State Bar of Michigan

Friday morning a section meeting on Federal Taxation with Raymond H. Berry, of Detroit, presiding also attracted an overflow meeting of lawyers. Friday noon—following the custom commenced last year—a luncheon honoring the members of the Michigan Supreme Court was attended by nearly six hundred lawyers. The names of the speakers appear on the program. It was necessary for Governor Frank Murphy, who was to have shared the program with Chief Justice Louis H. Fead of the Michigan Supreme Court, to cancel his engagement because of his hospitalization at the time.

The first speaker on Friday afternoon's program was Morris Goldman, Assistant Attorney General of Massachusetts, who outlined the prosecution of illegal practice of the law in his state by the Massachusetts Attorney General. Mr. Goldman was followed by a discussion of the Michigan Public Acts of 1937, which were discussed by members of the legislature which passed them. The speaker at the annual banquet Friday night was Clayton Rand, lawyer and editor from Gulfport, Mississippi, who last year was president of the National Editorial Association.

Saturday morning—after breakfasts given by the Michigan Women Lawyers Association and the alumni of the four Michigan law schools—was devoted to the annual business meeting of the State Bar. The meeting concluded Saturday noon with a luncheon which was addressed by Charles P. Taft, II, of the Cincinnati Bar. Mr. Taft's subject was "Legislation and the Labor Situation."

Ann Arbor is the home of the University of Michigan and all of the sessions of the convention, with the exception of the luncheons and banquet, were held in Hutchins Hall of the Law School. The entertainment program was arranged by the Washtenaw County Bar Association.

The officers of the State Bar of Michigan for the coming year were elected at the annual meeting of the Board of Commissioners at Ann Arbor, November 6. They are as follows:

George E. Brand, Detroit, President; Carl R. Henry, Alpena, First Vice-President; Julius H. Amberg, Grand Rapids, Second Vice-President; Glenn C. Gillespie, Pontiac, Secretary; Walter S. Foster, Lansing, Treasurer; Henry L. Woolfenden, Jr., Lansing, Executive Secretary (full time employee).

The Board of Commissioners for the coming year include the officers listed above, with the exception of the Executive Secretary, and the following lawyers:

Howard C. Baldwin, Detroit; James K. Brooker, Bay City; Roy E. Brownell, Flint; Howard L. Campbell, Manistee; Orien S. Cross, Holland; Fred G. Dewey, Detroit; Leo I. Franklin, Detroit; Roberts P. Hudson, Sault Ste. Marie; Charles M. Humphrey, Ironwood; Raymond R. Kendrick, Saginaw; Miles H. Knowles, Detroit; Norman E. Leslie, Jackson; Paul B. Moody, Detroit; Carl D. Mosier, Dowagiac; John A. Mustard, Battle Creek; Shirley Stewart, Port Huron.

New Mexico State Bar Holds Annual Meeting at Santa Fe—New President Delivers Address at Dedication of Recently Completed Supreme Court Building—Other Details of That Interesting Occasion—Addresses Delivered at Bar Meeting—Charles H. Fowler to Head Bar for 1937-38

THE annual meeting of the State Bar of New Mexico was held at Santa Fe on October 8th and 9th, 1937. It was made the occasion also for the dedication of the Supreme Court Building recently completed.

Addresses were delivered at the regular sessions by retiring President Alvan N. White, Hon. John P. Wood, of Los Angeles, United States Senator Carl A. Hatch, District Judge Irwin S. Moise, Supreme Court Justice Charles R. Brice, District Judge David Chaver, Jr., and by members of the State Bar James M. Hervey, of Roswell, and George W. Robertson, of Raton.

Chief Justice Andrew H. Hudspeth presided at the dedication ceremonies of the new building on the afternoon of October 9th, when short addresses were delivered by Justice Howard L. Bickley, J. O. Seth, Chairman of the Building Commission, Charles H. Fowler, President of the State Bar for 1937-1938, Frank A. Mouritsen, attorney for PWA, Justice A. L. Zinn, and by Mrs. Elizabeth Gonzales, Secretary of State. The spacious law library was employed for the occasion and was artistically decorated with gorgeous dahlias from the Governor's gardens. Pipe organ music aided in making the ceremonies very impressive. The building houses the Supreme Court, Law Library and Attorney General and State Treasurer offices. It was erected as a P. W. A. project at a cost of more than $300,000, is entirely modern and is adequately furnished in every detail.

The banquet and dance was held at La Fonda on the evening of October 9th, former Justice John C. Watson, acting as toastmaster, and the speakers were Justice Daniel K. Sadler, Carl H. Gilbert, United States Senator Dennis Chavez, Hugh B. Woodward, George L. Reese, Jr., and David W. Carmody. Approximately two hundred, lawyers and their ladies, attended this function, which furnished a very happy climax to a meeting which was probably the most interesting and enjoyable one ever held in New Mexico. Much credit is due District Judge Davis Chavez, Jr., who acted as General Chairman of the Committee on Arrangements and Entertainment.

Senator Hatch spoke on "Proposed Legislation relating to Federal Courts" and Judge Wood's subject was "Judicial Selection." Both of these addresses embraced discussion of problems of vital importance and of decidedly current interest to the bar. Our sincere thanks is extended to them.

Supreme Court Justice Brice offered "Some Suggestions Regarding Appellate Practice and Procedure," and noteworthy papers were read by District Judge Moise on "Trade Practice Relations" and by Mr. Robertson on "Examination of Real Estate Titles as Affected by Recent Statutes."

Supreme Court Justice Bickley at the dedication ceremonies, had for his subject "Homes of the Supreme Court in Santa Fe."

Senator Chavez at the banquet spoke on "The Trend of Liberalism" and Mr. Woodward on "The Brethren of Yesterday and Tomorrow."

The Board of Commissioners elected the following officers for the ensuing year: Charles H. Fowler, Socorro, President; Henry A. Kiker, Raton, First Vice President; Fletcher A. Catron, Santa Fe, Second Vice President.

CHARLES H. FOWLER,
President, State Bar of New Mexico

HERBERT GERHART,
Secretary-Treasurer.

North Carolina State Bar Holds Fourth Annual Meeting—Organization Held to Have Fully Measured Up to Hopes Which Inspired Its Creation—Interesting Addresses Delivered—President Vanderbilt Speaks on "Whither the Bar?"—Charles G. Rose Chosen President

THE fourth annual meeting of The North Carolina State Bar was held at the Sir Walter Hotel in Raleigh on Friday, Oct. 22, 1937, with morning and afternoon sessions. In the absence of Governor Hoey an address of welcome was delivered by Lt. Governor Wilkins P. Horton, to which Mr. Fred S. Hutchins of Winston-Salem responded. The report of the Secretary-Treasurer was made by Mr. Henry M. London, and the report of the Executive Committee was read by Councillor Junius D. Grimes.

Mr. Arthur T. Vanderbilt of Newark, New Jersey, President of the American Bar Association, delivered a thoughtful and interesting address entitled, "Whither the Bar?" He traced the position of the Bar in the public life of this country in broad outline for the past two centuries and indicated his belief that it was now passing through a period of transition with a future of perhaps greater influence and usefulness ahead. Mr. Vanderbilt is the youngest man ever elected to the Presidency of the American Bar Association. His address and his personality made a very pleasant impression upon the meeting.

Justice W. A. Devin, of the North Carolina Supreme Court, spoke on "The Growth of the Law and Some Suggested Changes." Judge Devin's address was not only enlightening but contained a number of interesting suggestions as to how practice and procedure could be improved. These suggestions brought to mind the fact that The North Carolina State Bar as now set up has no plans or committees for the improvement of the technique of jurisprudence. The remarks of Judge Devin call for a careful study and appraisal.

Mr. F. E. Winslow, President of North Carolina Bar Association, extended the greetings of the State Bar's parent. He commented upon the fact

CHARLES G. ROSE,
President, North Carolina State Bar

that the Bar Association, unlike the State Bar, did have facilities for deliberation and discussion in reference to the administration of justice and he outlined a number of practical problems which the North Carolina Bar Association was preparing to tackle. The importance of the voluntary association was stressed and members of the State Bar were urged to join in and support it vigorously.

At the afternoon session Mr. Ralph M. Hoyt, of Milwaukee, read a paper entitled, "Where Do We Go From the Commissions?" This paper continued the study of administrative law so interestingly discussed before the State Bar at its 1936 meeting by Col. O. R. McGuire. Few lawyers are aware of the extent to which the rights and activities of private individuals and corporations are governed by administrative commissions, both State and Federal. It is a jungle of tortuous paths and leadership of the Bar is desperately needed to introduce the concepts of due process which is an inheritance of the profession from the common law of England.

Mr. Giles J. Patterson, of Jacksonville, Florida, read a paper on "The Freedom of the Press." It was eloquently conceived and expressed and emphasized the belief that freedom of discussion and publication by a Bar imbued with the traditions of individual liberty are the sine qua non of the maintenance of the processes of democracy and the preservation of individual freedom.

Mr. C. W. Tillett, Jr., of Charlotte, on behalf of the Board of Law Examiners, made a report discussing the problems and policies of the Board and their efforts to adapt their practices to the attainment of the ends which all desire, namely, separating those who are qualified and those who are not qualified to enter upon the practice of the profession. It is thought that the address served a very useful purpose in giving the members of the State Bar a clearer insight into the difficulty of the problems involved.

Mr. D. E. Henderson, of Charlotte, made a report on the Judicial Commission appointed by Governor Hoey under the authorization contained in an Act passed by the Legislature of 1937. He invited suggestions from individual lawyers as to local problems in the various Judicial Districts and suggestions by which the system of allocation of Judges could work to the best advantage in disposing of the legal business of the State with the minimum of delay and inefficiency.

Mr. L. P. McLendon, of Greensboro, had expected to speak concerning work of the commission to study a State Department of Justice but was at the last moment unavoidably prevented from attending. Attorney General Seawell made a brief statement in his place.

Annual election of officers then occurred, as result of which Vice-President Charles G. Rose, of Fayetteville, was by unanimous vote elevated to the Presidency, President Julius C. Smith declining re-election. By a similarly unanimous vote Fred S. Hutchins, of Winston-Salem, was elected Vice-President. The meeting then adjourned.

There seemed to be a general consensus of opinion as attested by the large attendance and manifest interest of the lawyers of the State, that the State Bar in the four years of its existence has well measured up to the plans and hopes which had brought it forth; that it is rendering an important service to the profession and to the public welfare; and that it should go on resolutely with its work of elevating the profession to accord with the traditions of its history.

HENRY M. LONDON, Secretary.

Virginia State Bar Association Holds Successful Meeting at White Sulphur Springs—Former Governor Ehringhaus of North Carolina Delivers Annual Address on "Our Place in the Sun"—Distinguished Visitors Present

THE Forty-eighth annual meeting of the Virginia State Bar Association was held at the White Sulphur Springs, West Virginia, August 5th, 6th, and 7th, 1937. The meeting was well attended and was successful from every standpoint.

The President's address, delivered by Mr. James G. Martin, of Norfolk, was on the subject of "Keeping Fit to Be Lawyers."

Honorable J. C. B. Ehringhaus, former Governor of North Carolina, delivered the Annual Address, on "Our Place in the Sun."

A unique incident of the Annual Address was that it was delivered by a former Governor of North Carolina, and there were present Governors Peery of Virginia and Holt of West Virginia, and Honorable E. Lee Trinkle, a former Governor of Virginia. Another distinguished visitor on this occasion was Honorable George Maurice Morris, Chairman of the House of Delegates of the American Bar Association.

The officers elected at this meeting were President, Frank W. Rogers, of Roanoke; Vice-Presidents, Lyttleton Waddell, of Charlottesville, A. S. Harrison, Jr., Lawrenceville, J. C. Padgett, Independence, Charles B. Goodwin, Jr., Suffolk, J. Lynn Lucas, Luray. Secretary and Treasurer, Cassius M. Chichester, Richmond; new members of the Executive Committee, Paul H. Coleman, Lynchburg, Howard C. Gilmer, Jr., Pulaski.

The next Annual Meeting of the Association will be the fiftieth anniversary

FRANK W. ROGERS,
President, Virginia State Bar Association

of the founding of the Association, and plans are on foot for the appropriate celebration of this event. Hunsdon Cary, of Richmond, Va., is the Chairman of the Committee having in charge the semi-centennial celebration.

STUART B. CAMPBELL,
Chairman of Committee for Co-Operation with the American Bar Association.

West Virginia Bar Association Holds Fifty-first Annual Meeting—Judge John J. Parker Delivers Inspiring Address on "Social Progress and the Constitution"—Federal Judge John C. Knox Speaks Forcefully on Constitutional Subject—Judge McClintic's "Reminiscences," Etc.

THE West Virginia Bar Association held its Fifty-first Annual Meeting at the Greenbrier Hotel, White Sulphur Springs, September 16th, 17th and 18th, of this year.

The first session of the meeting was held during the afternoon of Thursday, September 16th. Following the invocation, address of welcome and the response thereto, the Secretary, Treasurer, Librarian, Vice-Presidents and Committee Chairmen of the various committees of the Association gave their respective reports.

Thursday evening the Honorable John C. Knox, Senior United States District Court Judge of the Southern District of New York, addressed the Association. Judge Knox's paper, concerning the Constitution, was forceful as well as instructive.

During the morning session, Friday, September 17th, Mr. Harry H. Bryer, delivered the annual address of the President, entitled, "The Railway Labor Act and the National Labor Relations Act—A Comparison." The intimate experience, contact and study of President Bryer incident to the administration of the first named act were quite apparent throughout his address, and added lucidity and interest to the comparison.

Following the President's address, the annual election was held. The newly elected officers are Thomas B. Jackson of Charleston, President; Charles P. Mead, of Wheeling, Secretary; John B. Meek, of Huntington, Treasurer; Wm. B. Mathews, of Charleston, Librarian. The members elected to the Executive Council are W. G. Stathers, Clarksburg, Chairman; Rolla D. Campbell, Huntington; Ashton File, Beckley; O. E. Wyckoff, Grafton. The newly elected delegate to the House of Delegates of the American Bar Association is Clarence E. Martin, of Martinsburg, a former President of the American Bar Association.

The morning session Friday, September 17th, was concluded by the splendid address of Mr. George Richardson, Jr., of Bluefield, on the Proposed Rules of Civil Procedure for United States District Courts. Mr. Richardson was in attendance, as a representative from the Southern District of West Virginia, at the Judicial Conference of the Fourth Federal Circuit at Asheville, North Carolina, this year when the proposed rules were discussed and as a consequence the Association received the benefit of his intimate knowledge of the various changes which will be effected by the new rules.

As a prelude to the address of Judge John J. Parker, of the United States Circuit Court for the Fourth Circuit, on the afternoon of September 17th, the

THOMAS B. JACKSON,
President, West Virginia Bar Association

Bill of Rights was read by Mr. W. G. Stathers of the Clarksburg Bar. Judge Parker's address, "Social Progress and The Constitution," was an inspiration to all in attendance. Without reference to his manuscript, Judge Parker delivered an address that was generally regarded as an unexcelled discussion of the practical effect of the Constitution upon contemporary society.

Following Judge Parker's address, Judge Jake Fisher, of Sutton, made a report to the Association of the result of the meeting of the nisi prius Judges of the State at Charleston, September 15th of this year. Probation and Parole was the subject under discussion at the judges' meeting and Judge Fisher's report in regard to this timely subject was both instructive and enlightening.

The afternoon session of September 17th was concluded by the report of the Committee on Legal History, given by Mr. C. C. Williams, Jr., of the Faculty of the College of Law of West Virginia University. This Committee is performing a fine service to the State through its preservation of ancient documents.

Honorable Edward W. Knight, of Charleston, presided at the banquet held Friday evening. Mr. Knight's ready wit and pleasing manner were responsible, to a large measure, in causing the banquet to be remembered as one of the outstanding events upon the program. So popular and well received were the Honorable George W. McClintic's "Reminiscences" as given at the Fiftieth Anniversary Meeting of the Association last year, that he was prevailed upon to give "More Reminiscences" at this year's banquet. Judge McClintic, who is the Judge of the District Court of the United States for the Southern District of West Virginia, has a greater store of interesting stories concerning the early development of the legal and political history of West Virginia than any other living West Virginian. As a result, his subject, abounding in subtle humor, was a source of great pleasure to all privileged to be in attendance at the banquet.

Honorable Claude N. Sapp, United States District Attorney, of Columbia, South Carolina, who was to give the Annual Banquet Address, could not be present because of illness, so Judge Knox and Judge Parker graciously filled his place on the program for the banquet. They proved to be resourceful extemporaneous speakers and their remarks greatly enlivened the occasion.

The concluding session of the meeting of the Association was held upon Saturday morning, September 18th. Honorable Charles F. Hosford, Jr., Chairman of the National Bituminous Coal Commission, addressed the Association on "The National Bituminous Coal Commission Act and Regulations." In view of the fact that coal mining is the major industry of the State of West Virginia, his authoritative address was of great interest to the lawyers in attendance. Mr. Hosford's paper was ably discussed by Mr. Robert S. Spillman, Sr., of the Charleston Bar, an outstanding authority on the Federal Statutes and decisions which resulted in the creation of the National Bituminous Coal Commission.

CHARLES P. MEAD, Secretary.

Junior Bar Council Has New Membership Plan

AT THE Council meeting of the Junior Bar Conference which was held in Chicago on November 19th and 20th, at which conference President Vanderbilt attended, there was proposed by the Chairman of the Junior Bar Conference Committee on Membership, Mr. Robert M. Clark, a new plan for the extension of membership of the Association and the Conference. The plan has the entire support of the officers and Council of the Conference and has been deemed by President Vanderbilt as extremely feasible. It is thought that, as an experiment, the plan might be attempted in one state out of each Circuit, for the present year, there being no intention, however, to let down on membership work in any of the other states.

The plan proposed, briefly, is that a permanent record or index file be established, which file would contain, on separate cards, the name of a lawyer eligible to membership in the Association, and his address, with space provided on the card for certain other information. In addition, there would be printed and prepared certain cards which will be sent by the immediate state officers of the Junior Bar Conference to an existing member in the city or vicinity in which the eligible lawyer resides. The immediate state officer, through these cards, would delegate the job of making a personal contact to the existing active member of the Conference. There would be a return card, which the contacting member would return to the State Chairman for placing in the permanent index.

It is thought by all who have considered the plan that this should be extremely effective. At least in a period of say, five years, there would be a definite check upon the lawyers who have been contacted, with pertinent information concerning their interest in the Association.

It is desirable that the utmost cooperation be obtained.

A Correction

EDITOR AMERICAN BAR ASSOCIATION JOURNAL:

Please permit me to call your attention to an error of statement which occurs in the October, 1937, issue of the American Bar Association Journal, which I feel is sufficiently important to merit correction. In Colonel Wigmore's very excellent report on the Congress of Comparative Law there appears on Page 786, under paragraph A. List of American Reporters, the name of Joseph Dainow and describes him as associated with Tulane University of New Orleans. This description is erroneous, since Professor Dainow is a member of the Faculty of Law of Loyola University, New Orleans, and has never been associated with Tulane University. I will appreciate it if you see fit to make this correction in the next issue.

JAMES THOMAS CONNOR,
Dean, Loyola University School of Law, New Orleans, La.
Oct. 11, 1937.

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